Public Prosecutor v Jowy Manjoro

HIGH COURT (KUALA TERENGGANU) — CRIMINAL TRIAL NO 45–55 OF 2000
AHMAD MAAROP J
30 DECEMBER 2004

Criminal Law — Dangerous Drugs Act (Malaysia) — Section 39B(2) — Trafficking — Whether prosecution established a prima facie case

Evidence — Agent provocateur — Prosecution witness had been convicted and had served a term of imprisonment — Whether unworthy of credit — Dangerous Drug Act 1952, s 40A(1) and (2)

Evidence — Proof of evidence — Admissions — Tape recording conversation — Authenticity not disputed by counsel for accused — Whether tapes were tampered with or altered in any — Whether there is sufficient material to warrant the court to conclude that the recorded sounds reproduce those originally made by the persons identified — Elements to be established for its admissibility

Evidence — Proof of evidavce — Presumption — Concealed camera — Failure to produce in evidence — Discretion to produce evidence — Whether prosecution has discretion to introduce any particular evidence at its disposal and to decide how its case is to be presented — Whether adverse inference tenable — Evidence Act 1950 s 114(g)

The accused was charged with trafficking dangerous drug, 630.4g of heroin. He delivered a quantity of heroin to SP15, an undercover agent. Their conversation and movement were recorded in an audio cassette tape and a concealed audio visual camera installed in an undercover room at a hotel where the accused was staying. On 26 March 2000, when he met SP15 in room 1722 Regent Hotel, Kuala Lumpur, the accused told SP15 that he already had part of [something] for SP15 and that the rest [of that thing] would be brought to SP15 the next day. At the end of the meeting with SP15 on 27 March 2000 in the Hotel room, the accused was arrested in the room and the substance [confirmed later to be heroin] was recovered from that room. The issue before the court was whether the evidence adduced by the prosecution had established a prima facie case of trafficking in dangerous drug against the accused.

Held, accused guilty as charged and sentencing him to death by hanging:

(1) Failure to produce the concealed camera installed by SP3 in room 1722 Regent Hotel, Kuala Lumpur had not caused any gap in the prosecution's case

resulting in failure on its part to discharge the burden of proving the case against the accused. Just as it is not necessary to produce the camera which was used to take photographs in a case, it is also not necessary to produce the concealed camera in this case. The evidence produced by the prosecution in this case (without the concealed camera) has successfully established a *prima facie* case against the accused (see para 125).

(2) The fact that SP15 had been convicted and had served a term of imprisonment did not mean that his evidence could not be believed. In the absence of material contradiction and in absence of any inherent improbability, his evidence should be accepted. Even though his role in this case was that of an agent provocateur, this did not render him a witness unworthy of credit. Similarly, any statement, whether oral or in writing made to him by the accused person shall be admissible as evidence at his trial. There is no requirement for the evidence of an agent provocateur to be corroborated (see para 134).

(3) There is no doubt at all in my mind that the accused had trafficked in dangerous drug, in that he had carried or sent the dangerous drug or delivered or supplied the same to SP15. Alternatively, the overwhelming evidence adduced by the prosecution in this case also established that the accused was in actual possession of 630.4g of heroin attracting the presumption under s 37(da)(i) of the Dangerous Drug Act 1952 (see para 140).

[Bahasa Malaysia summary

Tertuduh telah dituduh mengedar heroin, dadah berbahaya, seberat 630.4g. Dia menyerah sekuantiti heroin kepada SP15, seorang agen pengintipan. Perbualan serta pergerakan mereka telah dirakamkan dari sebuah bilik hotel berhampiran dimana tertuduh menginap dengan menggunakan pita kaset audio dan kamera audio visual yang tersembunyi. Pada 26 Mac 2000, bila tertuduh bertemu dengan SP15 di bilik 1722 Hotel Regent, Kuala Lumpur, dia memberitahu SP15 bahawa dia kini mempunyai separuh [sesuatu] untuknya dan selebihnya [dari benda itu] akan dibawa untuk SP15 pada keesokkan harinya. Pada 27 Mac 2000, di akhir perjumpaan dengan SP15 di bilik Hotel, tertuduh telah ditahan dan benda tersebut [kemudiannya disahkan heroin] diperolehi dari bilik tersebut. Isu di hadapan Mahkamah adalah sama ada keterangaan yang di kemukakan pihak pendakwa telah mensabitkan suatu kes prima facie pengedaran dadah berbahaya terhadap tertuduh.

Diputuskan, tertuduh didapati bersalah dan dijatuhi hukuman gantung sampai mati:

(1) Kegagalan mengemukakan kamera tersembunyi yang dipasang oleh SP3 di bilik 1722 Hotel Regent, Kuala Lumpur, pada pendapat saya tidak mengakibatkan wujudnya jurang di dalam kes pendakwa yang menyebabkan kegagalan mengemukakan bukti terhadap tertuduh di dalam kes ini. Sebagaimana ianya tidak perlu mengemukakan kamera yang diguna untuk mengambil gambar di dalam sesuatu kes, ianya juga tidak perlu mengemukakan kamera tersembunyi di dalam kes ini. Keterangan yang

di kemukakan pihak pendakwa di dalam kes ini (tanpa kamera tersembunyi) telah berjaya menbuktikan kes *prima facie* terhadap tertuduh (lihat perenggan 125).

(2) Walaupun pada hakikatnya SP15 pernah didapati bersalah dan mejalani hukuman penjara, ianya tidak bermakna keterangannya tidak boleh dipercayai. Melainkan jika terdapat kontradiksi materia and ketiadaan kemungkinan sedia ada (inherent improbability), keterangannya semestinya diterima. Walaupun peranannya didalam kes ini sebagai ejen provokator (agent provocateur) ianya telah tidak menjadikanya seorang saksi yang keterangannya tidak boleh dipercayai (unworthy of credit). Dalam keadaan yang sama, sebarang kenyataan, samada secara lisan atau bertulis, dibuat oleh tertuduh kepadanya boleh diterima sebagai keterangaan di dalam perbicaraan ini. Tidak terdapat peruntukkan bahawa keterangan ejen provocateur memerlukan sokongan (corroboration) (lihat perenggan 134).

(3) Pada pendapat saya tidak terdapat sebarang keraguan bahawa tertuduh telah mengedar dadah berbahaya kepada SP 15 yakni dia telah membawa atau menghantar atau mengedar dadah berbahaya tersebut. Secara alternatifnya ketindihan keterangan yang di kemukakan pendakwa di dalam kes ini juga telah mensabitkan tertuduh memiliki 630.4g heroin dengan itu membangkitkan anggapan di bawah s 37(da)(1) Akta Dadah Berbahaya 1952 (lihat perenggan 140).]

Notes

For cases on s 39B(2), see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 448–453.
For cases on agent provocateur genarally, see 7(1) *Mallal's Digest* (4th Ed, 2002 Reissue) paras 258-284.
For a case on presumption, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2230.
For a case on admissions, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2219.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16 (refd)
Adel Muhamed El Dabah v Attorney General of Palestine [1944] AC 168 (refd)
Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193 (distd)
Girdari Lall & Ors v PP [1946] MLJ 87 (refd)
KS Roberts v PP [1970] 2 MLJ 137 (refd)
Khoon Chye Hin v PP [1961] MLJ 105 (refd)
Lai Ah Kam v Rex [1939] MLJ 306 (refd)
Mohd Ali bin Jaafar v PP [1998] 4 MLJ 210 (refd)
Muharam v PP [1981] 1 MLJ 222 (refd)
Muniandy & Ors v PP [1966] 1 MLJ 257 (refd)
Namasiyam & Ors v PP [1987] 2 MLJ 336 (refd)
PP v Dato' Seri Anwar Ibrahim (No 3) [1999] 2 MLJ 1 (refd)
R v Chen [1993] 2 VR 139 (refd)
R v Maclean And Maclean [1979] 49 CCC 399 (refd)
R v Maqsud Ali [1965] 2 All ER 464 (refd)
R v Parsons [1977] 80 DLR 430 (refd)
Taylor v Chief Constable of Cheshire [1987] 1 All ER 225 (refd)

A *Teoh Hoe Chye v PP* [1987] 1 MLJ 220 (refd)
Williams v The Queen [1982] Tas R 274 (refd)
Yau Heng Fang v PP [1985] 2 MLJ 335 (refd)

Legislation referred to

B Dangerous Drugs Act 1952 ss 37(da)(i), 37A(1)(b), 39B(2), 40A
Evidence Act 1950 s 114(g)

Ahmad Bache (Deputy Public Prosecutor) for the public prosecution.
Mohammad Yacob Karim (Razdianna bte Abd Wahab with him) (Saladin & Associates) for the accused.

C

Ahmad Maarop J:

THE CHARGE

D **[1]** The accused was charged before me with the following charge of trafficking in dangerous drug, to wit, 630.4g of heroin:

> Kamu adalah dituduh di atas arahan Pendakwa Raya dan pertuduhan terhadap kamu adalah seperti berikut:

E

> Bahawa kamu pada 27 Mac 2000, jam lebih kurang 2.42 petang, di bilik No 1722, Hotel Regent Kuala Lumpur, Wilayah Persekutuan, telah mengedar dadah berbahaya iaitu 630.4g heroin, oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan kamu boleh dihukum di bawah s 39B(2) Akta yang sama.

F THE CASE FOR THE PROSECUTION

[2] To prove the case against the accused, the prosecution called 18 witnesses to testify.

G **[3]** According to the evidence led by the prosecution, on 25 March 2000, Larry Wayne Sprout (SP3), a supervisor in the Drugs Enforcement Agency (DEA), USA was assigned as Assistant Country Attache of DEA Singapore Office. On that date, SP3 arrived in Kuala Lumpur to coordinate the execution of a project involving joint operation of the DEA and the Royal Malaysia Police (RMP). At about 6pm on that H date, SP3 conducted a briefing at the Mandarin Oriental Hotel, Kuala Lumpur. Present in the briefing were DSP Mohd Shahrizan bin Che Mat Zin (SP12), DSP Mohd Zahari bin Ismail and ASP Roslan bin Ismail, from the RMP, and DEA agents — Mr Michael Patrick Horan (SP9) and Mr. James Tse (SP10). Tunde Taju (SP15) was also present in the briefing. SP3 told those present in the briefing that the I project concerned a suspect whom SP3 knew as Moyo Eshton Mehluli also known as 'Obi', also known as 'Bad Man'. The suspect would be delivering a quantity of heroin to SP15, an undercover agent, who was acting under SP3's direction and control. SP15 was expected to receive a quantity of heroin in Kuala Lumpur which was to be delivered by the aforesaid suspect. SP3 said, he had received this information on 24 March 2000 in a telephone conversation between SP15 and the

suspect which was recorded by him in audio cassette tape. The call was made to a hand phone belonging to the suspect. The suspect's telephone number was 016-2960491. The number was furnished by the suspect to SP15. SP3 had dialled the number himself. Explaining further on this telephone call, SP3 said on 24 March 2000 he was in Singapore. SP15 was in Jakarta, Indonesia. SP3 telephoned SP15 in Jakarta and did a link-up call by dialling the suspect's telephone number (016-2960491). While the conversation was taking place, SP3 recorded it in an audio cassette tape at the DEA office in Singapore. SP3 heard what was spoken by SP15 to the suspect. SP3 also heard what was spoken by the suspect to SP15. So, according to SP3, he conducted the briefing based on that conversation.

[4] Elaborating on the briefing on 25 March 2000, SP3 said the RMP had authorised him to install a concealed audio visual camera in an undercover room at a hotel, where SP3 could record both on video and on audio tape, the events taking place (which was the anticipated delivery of heroin by the suspect to SP15). In the briefing it was also agreed that a room adjoining the first room be obtained which would be used as a surveillance room. SP3 would install a receiving device, a monitor screen and a video cassette recorder in that room. The room would also be utilised by the RMP arrest team to wait and to be ready to make the arrest of the suspect upon delivery of the heroin. In the briefing, it was also agreed that SP15 would display USD56,000 to the suspect in order to reinforce the suspect belief in SP15's role as a buyer of the heroin. It was further agreed that the meeting between the suspect and SP15 would take place the following day — 26 March 2000.

[5] On 26 March 2000, as planned SP9 reserved two rooms adjoining one another at the Regent Hotel, Kuala Lumpur. At about 2pm on 26 March 2000, SP3 arrived at the lobby of the Regent Hotel, Kuala Lumpur, where he observed SP9 and SP15 registering at the desk. SP9 obtained room 1724 which was to be used as the surveillance or monitoring room, and SP15 obtained room 1722, which adjoined room 1724. SP3 then transported to room 1724 all the technical equipment needed by him to record the events which would take place in room 1722. SP3 installed the concealed camera, and an audio transmitting device in room 1722. SP3 installed the recording equipment, the receiver and the receiving screen in room 1724. At about 2.30pm, SP3 was introduced to ASP Giam Kar Hoon (SP5) and the members of his team from the RMP. The understanding was that SP5's team would consist of the strike team, arresting team and surveillance team. SP3 identified C/Insp Choon Beng, D/L/Cpl 124473 Johan Shah bin Berahim, D/Sjn 10936 Shahrani bin Hj Omar and Sgt Major Abdullah bin Abdul Rahman as the members of SP5's strike team. At about 3pm on 26 March 2000, SP3 introduced SP15 to the members of the strike team. This was to ensure that they would know that SP15 was a DEA undercover agent, then acting under the direction and control of both SP3 and the RMP.

[6] Next, SP3 again briefed SP5 and his team of the anticipated meeting and delivery of heroin by the suspect to SP15. SP3 then discussed with them their operational plan. SP3 told SP5 and his men that SP15 would be showing USD56,000 which was kept in a safe deposit box at the hotel lobby, to the accused. The safe deposit box has been obtained earlier by SP9. SP3 discussed the arrest signal

and an additional signal to be given by SP15 during the undercover meeting with the suspect. SP15 was instructed to remove the baseball cap from his head upon delivery of the heroin by the suspect. SP15 would then depart from the room after informing the suspect that he was going to retrieve the money from the safe deposit box at the hotel lobby. It was also agreed that SP15 would then exit the room (Room 1722) at which point of time the arrest team led by SP5 would enter the room to arrest the suspect.

[7] Continuing his evidence, SP3 testified that after installing the concealed camera and the audio transmitting device in Room 1722, and after setting up the monitoring and recording equipment in room 1724, SP3 verified that all the equipment were operating properly. He verified that the monitoring screen show the picture of what was taking place in room 1722. He also verified that the video cassette recorder was working properly by using a video tape and playing it back to verify that it was recording the picture as well as the sound in room 1722. SP3 then rewound the video tape and set it at the start position from the beginning of the tape. SP3 found that the tape was in good working order. SP3 was then satisfied that everything was in good working order and that he was ready to record.

[8] Next, at about 3.30pm–4pm, SP3 went to room 1722 and made sure that there was no contraband or illegal goods in the room. He also verified that SP15 was not in possession of any contraband.

[9] At about 4.40pm on 26 March 2000, SP3 recorded a telephone conversation between SP15 and the suspect on a regular audio cassette tape. The tape which SP3 used was the same tape which he had used to tape the telephone conversation between SP15 and the suspect on 24 March 2000. SP3 had with him a cassette tape recorder with a microphone device which recorded both end of the conversation. In the telephone conversation, SP15 informed the suspect that he had arrived in Kuala Lumpur and would meet him at room 1722, the Regent Hotel. The suspect informed SP15 that he would be arriving at about 6pm on 26 March 2000.

[10] At about 7.40pm on 26 March 2000, the suspect arrived at room 1722. SP3 observed this from the monitor screen in Room 1724. The RMP arrest team members, SP9 and SP10 as well as other police officers from the RMP were also present with SP3 in room 1724 at that time. The suspect entered the room and sat down on a chair in the room. This was recorded by SP3 on the video cassette recorder using the same tape which he had set in the video cassette recorder earlier. SP3 observed on the monitor screen, the suspect telling SP15 that he had one kilogram of heroin already in Kuala Lumpur and was expecting the remaining to be delivered to Kuala Lumpur by Tuesday or Wednesday. In that meeting it was also mentioned that SP15 had USD56,000 for the purchase of the heroin. During the meeting SP3 also observed the suspect using his hand phone on three occasions. According to SP3, he observed and recorded live the meeting and the conversation between SP15 and the suspect. SP3 then identified the accused in court as the suspect. SP15 said the accused looked different in court than he was back then. According to SP15, on 26 March 2000, the accused was bald headed, clean-shaven and appeared to be heavier.

[11] At about 9.30pm on 26 March 2000, SP9 left room 1724 to go to the hotel lobby to observe SP15 and the accused looking at USD56,000 kept in the safe deposit box. SP3 then observed SP15 and the accused leaving room 1722 to look at the money. SP3 was later informed by SP9 that he and other members of the RMP surveillance team, had observed SP15 and the accused looking at the money at the safe deposit box adjacent to the lobby.

[12] SP3 then stopped recording and removed the video cassette tape from the video recorder. He removed the plastic tab from the video cassette tape. This was to prevent anyone from altering or recording anything additional on the tape. SP3 then placed a label on the tape with his initial, the date and location of the event recorded and the note that that was an original tape. SP3 produced the tape which was eventually accepted in evidence and marked as P27.

[13] SP3 then moved on to the events which took place on 27 March 2000. At approximately 2.40pm on 27 March 2000, SP3 observed on the monitor screen that the accused had arrived at Room 1722 and was seated in the room sofa chair. SP3 monitored and recorded the conversation between the accused and SP15 in which there was a discussion concerning the additional heroin that the accused was arranging to be delivered to Kuala Lumpur. SP3 observed the accused handing over to SP15 a white plastic shopping bag. SP3 observed SP15 inspecting the contents of the white plastic shopping bag. SP3 heard the accused telling SP15 that he wanted USD35,000. SP3 observed SP15 untying an additional bag which was contained inside the shopping bag. SP3 observed SP15 smelling the inside of the bag and made the statement, 'Right'. SP3 then observed SP15 removing his ball cap and placing it on the table in the room. This was a prearranged signal to indicate that SP15 had in fact received delivery of the heroin by the accused. At approximately 2.43pm on 27 March 2000, SP15 was observed preparing to exit the room to obtain the money to be paid to the accused for the heroin. SP5 and his team then positioned themselves in the hallway outside Room 1722, and were ready to effect the arrest on the accused upon SP15 opening the door and exiting the room. Next, SP3 observed on the monitor screen the RMP strike team effecting arrest the accused who was then still seated on the same chair. According to SP3, upon the arrest taking place, it was the DEA policy to stop the recording of the tape, which SP3 momentarily did. However, he was instructed by DSP Shahrizan (SP12) to continue to record the event taking place during the arrest and the processing of the crime scene. So, SP3 began recording again and continued to record the processing of the crime scene until it was completed. After recording stopped, SP3 removed the tape from the recorder. He removed the tab to prevent any alteration or additional recording on the tape. He then initialled the label on the tape indicating the date of the event, the location and note the fact that tape was an original tape. SP3 produced the tape which was eventually accepted by the court in evidence and marked as P29. SP3 said later, he transferred the custody of P27 and P29 to SP9.

[14] SP3 also produced in evidence the DEA equipment which he had used to record the events which took place in room 1722 on 26 March 2000 and 27 March 2000. He produced the monitoring screen (P22), the receiving device (P23), the microwave antenna (P24) and the video cassette recorder (P25). According to SP3,

the function of the receiving device (P23) was to receive the radio wave being transmitted by the concealed camera and the audio device which he had concealed in room 1722. SP3 said he could not produce the said concealed camera and the audio transmitting device because it would compromise DEA operation by revealing in open court what they used 'to record bad guys'. He said this was covered by the diplomatic note 226 (P20), issued by the American Embassy.

[15] Questioned by the DPP as to what he did with the audiocassette tape which he used on 24 March 2000, 26 March 2000 and 27 March 2000, SP3 said, on 27 March 2000 he removed the two tabs from the tape to prevent any alteration or additional recording. He then filled out the evidence label on the tape which show the DEA case, the date/dates of the conversation in the tape and his initials. SP3 then brought the tape back to the DEA office in Singapore, where he personally did the duplication using a DEA high speed-duplicating machine which was standard equipment in the DEA offices world wide. According to SP3, as a part of DEA working procedure, he had played back the duplicated tape to ensure that it had in fact been duplicated from the original. Upon verifying, SP3 removed the tabs from the duplicated tape to prevent any alteration or additional recording on the tape. He then made markings on the tape. The markings were the same as the original tape. The markings showed the DEA case number, the dates of the conversation - 24 March 2000, 26 March 2000 and 27 March 2000, his initials and the note to indicate that the tape was a copy of the original. SP3 said he then posted the original tape and the copy to SP10.

[16] Except for certain matters which I will highlight shortly, the whole of SP3's evidence remain unchallenged by the defence. In cross-examination, it was put to SP3 that Room 1722 was registered in the name of the Adewale, who was a Nigerian, in response to which SP3 said he had no knowledge of what the registration was. It was put to SP3 that a person by the name of Adewale was registered for Room 1722. SP3 answered it could be and said that he did not see the registration. Counsel for the accused then questioned SP3 on the offence committed by SP15 for which he was sentenced to a jail term. SP3's reply was that SP15 was serving sentence for the offence of bank fraud and conspiracy to commit bank fraud and he was sentenced to 12 to 18 months imprisonment.

[17] Further, in his evidence under cross-examination, SP3 agreed that he did not actually see what was contained in the additional bag [which was found in the shopping bag]. Questioned by counsel as to whether he had known the accused before the arrest, SP3 said he had seen the accused on surveillance before Kuala Lumpur, but he did not know him. He had also not spoken to him. Counsel then put to SP3 that he did not actually know the sound of the accused's voice. SP3 disagreed, and said that he recognised the accused's voice, because he had recorded numerous telephone conversations between the accused and SP15. SP3 said, he recognised the accused's voice when he appeared on the monitor screen and that the accused's voice was the same as the voice he had heard in the telephone conversation previously. Questioned on the link-up call he did on 24 March 2000 in respect of the telephone conversation between SP15 and the accused, SP3 said he did not speak to the accused. Counsel then asked how could he recognise the accused's

voice when he had not spoken to the accused. SP3 said he could recognise the accused's voice when he recorded telephone calls prior to 26 March 2000. According to SP3, he heard the accused's voice from viewing the tape, and that when the accused entered Room 1722 and began to speak, he immediately recognised that it was the same voice that he had previously recorded on audio tape. Questioned by counsel on P27 and P29, SP3 said P27 and P29 were always in his custody and control until he transferred them to the custody of SP9.

[18] Under re examination by the DPP, SP3 said that on 26 March 2000 and 27 March 2000, he saw only two Nigerians in Room 1722 — SP15 and the accused. Asked by the DPP about his evidence under cross-examination, that he had recorded numerous telephone conversations between SP15 and the accused, prior to the meeting on 26 March 2000, SP3 said there were other telephone conversations between SP15 and the accused before 24 March 2000. According to SP3 on those occasions, the accused was using different hand phone numbers and that they were used by him in Indonesia. According to SP3, some of the conversations were about this case. Questioned by the DPP as to how he did the link up call when he was in Singapore and SP15 was in Jakarta, SP3 said he did not know where the accused was at the time he did the link-up call. SP3 said all DEA offices had the capability of doing link-up call because of the importance of recording telephone conversation between suspects and confidential sources and DEA agents working in undercover capacity. SP3 said he telephoned SP15 in Jakarta first. After he was connected to SP15 (and after alerting SP15 that they were making the undercover call), SP3 would put SP15 on hold. SP3 then telephoned the accused. Once the phone started ringing SP3 removed SP15 call from being on hold and it was then connected with the accused, at which time SP3 was recording the call through the use of the DEA technical equipment. SP3 said at its office in Singapore, the DEA had the capacity to do link-up call as well as the ability to record.

[19] The next witness whose evidence must be referred is Michael Patrick Horan (SP9). On the whole SP9's evidence corroborated the evidence of SP3 in material particulars. SP9 was a special agent of the DEA, Tuscon, Arizona office USA. On 25 March 2000, SP9 was attached to the DEA country office at the American Embassy in Kuala Lumpur. According to SP9, on 25 March 2000 at about 6pm, he attended a briefing with the officers of the RMP at the Mandarin Hotel Kuala Lumpur. The meeting was chaired by SP3 who was the head of the operation. The meeting discussed the drug trafficking activity of a suspect by the name of Moyo Eshton Mehluli. It was agreed that two adjoining hotel rooms would be obtained for the operation and that SP15 would act as undercover agent to deal with the suspect. With the permission of the RMP, the DEA would install a hidden camera in one of the hotel rooms to facilitate the operation. The meeting also agreed that arrest would be made by the RMP strike team.

[20] As discussed on 25 March 2000, on 26 March 2000 SP9 obtained two adjoining rooms in the Regent Hotel Kuala Lumpur. At about 2pm on that day, SP9, SP3, SP15, SP10 and police officers from the RMP went to the hotel. SP9 and SP15 registered at the hotel. SP9 checked into room 1724 and SP15 checked into Room 1722. Referring to the hotel registration card (P35), SP9 said certain incorrect

particulars on P35 were deliberately furnished for undercover purposes. After the registration, SP9, SP15, SP3, SP10 and police officers from the RMP went up to the two rooms. SP15 went into Room 1722 and remained there. SP9, together with SP3, SP10 and police officers from the RMP went to room 1724. SP9 said at about 2.15pm on 26 March 2000, SP3 installed his surveillance equipment. SP3 installed a camera in Room 1722. SP3 installed the rest of the equipment in room 1724. SP3 then tested all the equipment installed in both rooms and found them to be in working order. SP9 identified P22, P23, P24 and P25 as the equipment installed in both the rooms.

[21] At approximately 2.30pm, SP5 and the members of his strike team arrived at room 1724. SP9 and SP15 then went down to the hotel lobby and obtained a safe deposit box from the hotel. SP9 placed USD56,000 inside the safe deposit box. SP9 and SP15 had access to the safe deposit box.

[22] At about 3pm SP15 was introduced to SP5 and members of the strike team. There was a briefing given by SP3. How the narcotic deal would take place was discussed. It was agreed that SP15 would take off his baseball cap to signal that he had seen the heroin.

[23] According to SP9, at approximately 4pm, he and SP3 went to Room 1722 and there, SP3 searched SP15. SP3 also searched Room 1722 for contraband. None was found in the room or on SP15. At approximately 4.07 pm, SP3 recorded in audio a telephone call from SP15 to the suspect. In the telephone conversation, SP15 and the suspect negotiated the delivery of heroin to SP15. The suspect said he would be coming over to the hotel room at 6pm.

[24] At 7.40pm on 26 March 2000, as SP9 was watching the monitor screen in room 1724, he saw the suspect meeting SP15 in Room 1722. SP3 recorded the meeting. According to SP9, the suspect told SP15 that he had 1 kilogram of heroin in Kuala Lumpur and that he could get the rest by Tuesday or Wednesday. SP15 informed the suspect that he had USD56,000 placed in a safe deposit box in the hotel. At about 9.20pm, as the meeting between SP15 and the suspect was breaking up, SP9 said he went down to the hotel lobby and sat on a chair where he could observe the entrance to the safe deposit box. At about 9.30pm, SP9 observed SP15 and the suspect enter the safe deposit box area. At about 9.35pm, SP9 saw both of them come out of the safe deposit box area. The suspect left the hotel and SP15 returned to Room 1722. SP9 then identified the accused in court as the suspect. SP9 said on 26 March 2000 the accused was bald, clean shaven and was heavier.

[25] Continuing his evidence in examination in chief, SP9 testified that on 27 March 2000 at about 2pm, officers from the RMP and the DEA arrived at the Regent Hotel. Members from the RMP included SP5 and members of his strike team. All of them proceeded to the same two rooms — 1722 and 1724. At approximately 2.15pm, SP3 searched SP15 and Room 1722 for any contraband. None was found on SP15 or in Room 1722. At about 2.17pm, SP15 made a

telephone call to the accused. That call was recorded by SP3 in SP9's presence. In the telephone conversation, SP15 said he was in the room and was ready to proceed with the deal.

[26] At about 2.33pm, SP5 informed SP9 and SP3 that his surveillance team had observed the accused walking towards the Regent Hotel. At about 2.35pm, SP9 saw on the monitor, SP15 talking using the hotel telephone in Room 1722. At about 2.36pm SP15 telephoned SP3 informing the latter that the accused was coming.

[27] SP9 testified further that at about 2.40pm, he saw on the monitor screen, the accused entering Room 1722. The accused was carrying a brief case. He went to a chair in the room and sat down. The accused put the brief case on the floor and informed SP15 that he had the drug with him and that he wanted USD35,000. The accused then leaned down towards the brief case and handed to SP15 a white plastic shopping bag. SP15 looked into the shopping bag, put his head towards the bag as if to smell it and said, 'Yeah, looks good'. SP15 then took out a second white plastic shopping bag which had a blue marking on it and brought it over to the table in front of the camera. SP15 opened up that blue bag which contained a third white shopping bag. SP15 then took off his baseball cap, which was a signal that he had seen the heroin. SP15 told the accused that he was going downstairs to get the money. As SP15 exited the room, SP5 and his strike team entered Room 1722 and placed the accused under arrest at about 2.43pm.

[28] When shown the plastic bag (P36), SP9 said that bag and its contents were not in possession of SP15 or in Room 1722 on 26 March 2000 and 27 March 2000. SP9 identified P37 as the second plastic bag which had a blue marking. SP9 also identified P38 as the third plastic bag which he had described. SP9 also testified that at the conclusion of the operation of this case on 27 March 2000, SP3 handed to him P27 and P29. SP9 then took P27 and P29 back to his office at the American Embassy in Kuala Lumpur, where he secured them in his steel-cabinet safe. SP9 said only he had access to the safe and that he did not do anything to the tapes. On 12 April 2000, SP9 brought P27 and P29 to Chandra Segaran s/o Subramaniam (SP11), the audiovisual technician who was then working at the American Embassy in Kuala Lumpur. SP9 requested SP11 to make two copies of each of the two tapes (P27 and P29).

[29] Under cross-examination, counsel for the accused put to SP9 that Tony Adewale was the person occupying Room 1722 as a guest of Hotel Regent. SP9 said he knew that person as Tunde Taju (SP15) who was also known as Tony. It was then put to SP9 that the person occupying Room 1722 was Tony Adewale. SP9's reply was that Tony Adewale and Tunde Taju was the same person. SP9 agreed that throughout the whole of the two briefings by SP3, the name used was Tunde Taju @ Tony and that the name Tony Adewale was not used. When asked who was Tunde Taju Amusa, SP9 said he did not recognise the last name (Amusa). Counsel for the accused then put to SP9 that he would not know whether Tunde Taju Amusa and Tunde Taju @ Tony refer to one and the same person. SP9 said that he did not know. SP9 also agreed that in the briefings, SP3 mentioned the name of the suspect as Moyo Eshton Mehluli @ Obi @ Bad Man. SP9 agreed that in his evidence earlier, he had

mentioned the name of the suspect as Moyo Eshton Mehluli. Counsel then asked SP9 whether he knew the name of the accused?. SP9's answer was that he knew the accused as Moyo Eshton Mehluli before he was arrested. SP9 added that after the accused's arrest, he discovered that the accused also used the name Jowy Manjoro. Except for the matters which I have just highlighted, the whole of SP9's evidence remained unchallenged by the defence.

[30] I now come to the evidence of SP15. The narration of SP15's evidence must start with his evidence as to what happened in Jakarta, Indonesia on or about 15 March 2000. As would be seen later, what happened there on that date triggered a series of events culminating in the arrest of the accused on 27 March 2000 in Room 1722, the Regent Hotel Kuala Lumpur.

[31] According to SP15's evidence, he was a businessman having an address at 102, Neptune Court, Bronx, New York. According to him his other names were Amusa and Tony. SP15 said he was working with the DEA as a confidential source. As a confidential source with the DEA since 1992, SP15 also assumed the role of an undercover agent for DEA in entrapments of potential drug pedlars.

[32] On or about 15 March 2000, SP15 arrived in Jakarta and met one Mr Obi (who was identified by SP15 in the trial as the accused). SP15 had earlier on spoken with the accused from New York, which conversation was recorded by the DEA. According to SP15, it was the accused who suggested to him to come to Jakarta to carry back drugs from Indonesia to America. However, when SP15 met the accused in Jakarta, the accused told him that he (the accused) would be going to Thailand and that he would not come back to Jakarta for the purpose of drug business. When asked for the reason by SP15, the accused said that the Indonesian Police had killed 10 Africans (drug traffickers) recently and then it was dangerous for him to do the drug business in Indonesia. The accused suggested that SP15 should meet him in Kuala Lumpur. SP15 told the accused that trafficking in dangerous drugs was punishable with death penalty in Malaysia. In response, the accused told SP15 that 'Malaysia is very easy' and that 'it was easier than anywhere else and that people do not check anything at all here'. SP15 then agreed to meet the accused in Kuala Lumpur. SP15 told the accused that he would contact the accused when he arrived in Kuala Lumpur. According to SP15, everything he did was done with the knowledge of Mr Larry Sprout (SP3) and that every call he made to the accused would be recorded and documented and that he would have to account for every such call SP3.

[33] SP15 said on 25 March 2000, he arrived in Malaysia for the purpose of buying dangerous drugs from the accused and this was done on the instruction of the DEA. Upon his arrival at the Airport in Kuala Lumpur, SP15 met the DEA officers based in Kuala Lumpur. SP15 also met DEA special agent Michael Patrick Horan (SP9), James T Tse (SP10) and SP3 who had also arrived at Kuala Lumpur on the same day on another flight. All of them then proceeded to the Mandarin Hotel Kuala Lumpur. At the hotel, SP15, SP3, SP9 and SP10 had a meeting with officers from the RMP in SP15's room. At the meeting, they discussed about the operation of buying drug from the accused. SP3 explained the details of the operation to everyone in the meeting. SP15 testified that his assignment was to discuss with the accused and

to find out if he actually had the drug with him. It also agreed that Regent Hotel Kuala Lumpur would be the place where SP15 would buy the drug from the accused and that SP15 would check into the said Hotel on 26 March 2000.

[34] On 26 March 2000 at about 2pm, as prearranged, SP15 checked into Room 1722, Regent Hotel Kuala Lumpur and SP9 checked into the adjacent room 1724 of the hotel. In the registration form (P34), SP15 registered his name as 'Tony Adewale', which was his undercover name to protect his true identity. After SP15 and SP9 checked into their respective rooms, there was a meeting held in room 1724. In that meeting SP15 was introduced to police officers from the RMP. The police officers from the RMP was told that SP15 would take off his cap as a signal to them (in room 1724) that the accused had delivered the drug to SP15. They would then enter Room 1722 to arrest the accused. Continuing his evidence, SP15 said that after the meeting, SP3 set up video equipment in Room 1722 so that the events taking in that room could be seen and recorded on the monitor screen in room 1724. After installing the recording equipment in Room 1722, SP3 searched SP15. SP3 also searched Room 1722. This was done to ensure that there was nothing illegal on SP15 or in Room 1722. After that, SP15 made a telephone call to the accused. This call was made from Room 1722 and the telephone conversation was recorded by SP3. In the telephone conversation SP15 told the accused that he was at the Regent Hotel Kuala Lumpur. SP15 gave the accused his room number and told the accused he was ready if the accused had the drugs to deliver. SP15 invited the accused to come to his room so that they could finalise their drug deal. The accused told SP15 that he would meet SP15 shortly and that SP15 should wait for him. SP15 then waited for the accused to come. After waiting for almost three hours, the accused did not turn up. SP15 called the accused again. The accused told SP15 to wait for him and that he was trying to put everything together and that he would come very soon. This second call was made at about 7.08pm on 26 March 2000. A few minutes later, the accused came to meet SP15 in Room 1722. According to SP15 when the accused came in, he told the accused that he had been waiting very long. SP15 asked the accused why he was delayed. The accused told SP15 that he had only one kilogram of heroin for SP15 instead of four kilograms. The accused told SP15 to wait in Malaysia for a few more days and he would be able to deliver the balance of the three kilograms. SP15 asked the accused how could he offer only one kilogram when he had promised to deliver four kilograms. SP15 said he told the accused about his plan back in America. SP15 then asked the accused how much he had to pay since the accused had only one kilogram for him? SP15 also told the accused that to show that he was serious, he would show the accused his money at the hotel. SP15 then led the accused to the hotel lobby where he showed the accused the money which was kept in the safe deposit box. SP15 told the accused that he would be waiting for the drugs to be delivered. The accused said he would deliver the drugs the next day. SP15 also told the accused that he would not be sleeping at the Regent Hotel that night (26 March 2000) and he would call the accused the next day when he come to the hotel.

[35] Continuing his evidence, SP15 said on 27 March 2000 at about 2pm, he went back to Room 1722, the Regent Hotel. SP3 searched him, as well as Room 1722 to ensure that there was no contraband on him and in the room. At about 2.15pm, SP15 made a telephone call to the accused from Room 1722. SP15 informed the

A accused that he was in the room and that the accused could come to the room to deliver the drugs. The accused told SP15 that he had called before SP15's arrival at the hotel and that he would come to the hotel soon. That telephone conversation was recorded by SP3.

B **[36]** At about 2.30pm on the same day, the accused telephoned SP15 from the hotel lobby and informed SP15 that he had arrived at the hotel and would be seeing SP15 soon. Using the room telephone, SP15 then telephoned SP3 alerting SP3, SP9 and the police officers from the RMP (who were all in room 1724), that the accused was on his way to Room 1722.

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[37] According to SP15, at about 2.35pm, the accused arrived at Room 1722. The accused pressed the door bell. SP15 opened the door for the accused and SP15 saw the accused carrying a brief case bag. SP15 offered the accused a seat. The accused told SP15 that he had the drugs in the bag. The accused then opened the brief case bag and delivered to SP15 a shopping bag (NICOLE Shopping bag). Inside the NICOLE Shopping bag, there was another shopping bag which was green and white in colour with the writing 'WATSON' written on it. Inside the WATSON shopping bag, there was another bag which contained the drug. SP15 opened that bag and smelled it. According to SP15, he knew then that was heroin. SP15 asked the accused how would he (SP15) know that was one kilogram? The accused told SP15 that SP15 should believe him that the quantity was one kilogram. SP15 then asked the accused how soon will he able to get the rest of the heroin? The accused told SP15 that it would not be more than two to three days and that SP15 should take care of that first and give him some money to arrange for the rest of the heroine. SP15 told the accused that he would give the accused 35,000 dollars. The accused said okay and that he would deliver to SP15 the rest of the heroin. The accused also apologised for the delay and the loss of time that he had caused to SP15. According to SP15, at that point as he was sure that what the accused had given him was heroin, he pulled off his cap as a coded sign for the arrest team in the next room (1724). After pulling off his cap, SP15 told the accused that he would have to go to the lobby to bring up the money (35,000 dollars) for the accused. As he left the room, SP15 told the accused to wait for him in the room. SP15 then left the room. By then the arrest team from the RMP was already waiting at the door. As soon as SP15 stepped out of the room, the arrest team went into the room (1722) with the accused and the drug still in the room.

H **[38]** In his evidence, SP15 identified P6 as the brief case bag carried by the accused into Room 1722. SP15 identified P36 as the shopping bag which contained the green and white colour WATSON bag. SP15 identified P37 as the WATSON bag (which was inside P36). SP15 identified P38 as another plastic bag found in P37. According to SP15, P38 contained the drug. When shown P39, SP15 said that the drug contained in P38 was something like that but was then not as powdery as it was seen in court.

Cross-examination of SP15 was aimed at establishing:

(a) that the particulars written on P34 were particulars of another person by the name of Tony Adewale,

(b) that there could have been another person by the name of Tony Adewale registered for Room 1722 between 26 March 2000 and 27 March 2000,

(c) that SP15 did not know that the accused's real name,

(d) that SP15 had fabricated the particulars given in P34.

[39] In his evidence at the start of his cross-examination, SP15 said his name was Tunde Taju and that he was a Nigerian citizen. However he did not live in Nigeria. He had since 1980 been living in America. SP15 said he was not an American citizen, but he was an American resident. Counsel for the accused then tendered SP15's passport as a defence exh (D46). D46 is the passport of the Federal Republic of Nigeria in the name of Tunde Taju. Questioned by counsel for the accused, SP15 said the thumbprint on the passport was his thumbprint and underneath the thumbprint was his name: T. Tunde and T was a short form for Taju. SP15 also identified the photograph at p 3 of D46 as his photograph. When asked about his signature, SP15 said that in Nigeria one did not have to sign on the passport. According to SP15, putting his name at the column where the signature was supposed to be, amounted to signing the passport.

[40] Counsel for the accused then asked SP15 whether the signature under the thumbprint was his. SP15 answered in the affirmative. SP15 also agreed that in D46, other that Tunde Taju, no other name was mentioned.

[41] SP15 also agreed that at the briefing at the Mandarin Hotel Kuala Lumpur on 25 March 2000 he was introduced to the officers of the RMP as Tunde Taju.

[42] When questioned by counsel for the accused what did he mean by confidential source, SP15 said a confidential source was a kind of undercover agent who followed up on the information received by him or the DEA to see if there was a case relating to buying and selling drugs. SP15 added that he also worked for the Secret Service of the USA.

[43] Counsel for the accused next questioned SP15 on P34. Referring to the name 'Tony Adewale' written on P34 and other particulars written thereunder in respect of that name, it was put to SP15 that the particulars written on P34 were the particulars of another person occupying Room 1722. SP15 answered as follows:

> It is me that occupying Room 1722 with a different information at the registration time in order to protect my identity and my safety because of the nature of the drug business that we are about to do at that particular time and place. This information given also protect me when I leave the country from anybody that will follow me and put my life in danger. It is an information that I wrote down on the card at the Hotel, for the purpose of drug business and not for other purpose and in this particular case, Tony Adewale had been my undercover name with Mr Obi (the accused).

[44] Counsel for the accused put to SP15 that he had fabricated the information given on P34. SP15 disagreed, and explained that the information was given by him to protect himself and his family. When it was put to him that the signature on P34

was also forged, SP15 disagreed and said that the signature on P34 was his signature and added that the signature on P34 was made in 1997 whereas the event took place in the year 2000. SP15 said he could produce his driving licence. Further, SP15 disagreed that SP3, SP9, DSP Giam (SP5) and all the officers of the RMP involved in this case did not know him as Tony Adewale. SP15 also disagreed with counsel, that he could have another friend by the name of Tony Adewale registered in Room 1722 between 26 March 2000 and 27 March 2000.

[45] Questioned on his prison term, SP15 admitted that he was released from the prison in New York after serving a sentence of 10 months imprisonment for bank fraud and conspiracy to commit bank fraud.

[46] Questioned about the accused, SP15 said he had known the accused since 1999 and that he met the accused for the first time in December 1999 in Jakarta. SP15 said, even before that he knew the accused's name as 'OBI', because he had spoken with the accused on the telephone on several occasions. SP15 agreed that he only knew the accused as OBI. SP15 said he did not know who was Moyo Eshton Mehluli. SP15 also said he did not know who was 'Bad Man'. When it was put to him that he did not know the accused's real name, SP15 said he knew the accused as OBI which was a Nigerian name and that was enough for him.

[47] Counsel for the accused next referred to the photograph of the accused on the inside cover of his passport and asked whether that was the photograph of the accused. SP15's reply was, 'Right now I cannot recognise the accused as the person shown in this photograph. Based on the passport which was given to me now (P7G)'. When it was pointed out to him that based on P7G, the accused's name was Jowy Manjoro, SP15 said he did not know the accused as Jowy Manjoro and that he knew the accused as OBI, a Nigerian who spoke the Nigerian language fluently. Counsel for the accused then referred to SP15, insurance policy of the accused (P7D) and the airline return ticket (P7E) which were all in the name of Jowy Manjoro. SP15 said he did not know.

[48] Counsel for the accused then put to SP15 that from the time he met the accused until the time the accused was arrested and with all the facilities to do the link-up call and despite the surveillance, SP15 did not know the real name of the accused. SP15 agreed but explained that, 'in undercover operation it does not make sense for me to double check and question the target (which is the accused) about other names he might have or other things he might be doing away from the drug business. That would open rooms for him to be suspicious. Yes, I do not know his real name'.

[49] To counsel's question as to where did he sleep on the night of 26 March 2000, SP15 said he slept at Mandarin Hotel, because he had shown the accused the money which he had and it would not be safe for him to sleep at the Regent Hotel that night (26 March 2000).

[50] Other than the evidence which I have highlighted, the wholeof SP15's evidence was not challenged at all by the defence.

[51] The next witness whose testimony must be set out is that of SP5. On 26 March 2000 SP5 was attached to the Narcotics Department, the RMP Headquarters, Bukit Aman. According to SP5, on 26 March 2000 he and team of police officers from the RMP attended a briefing by SP3 in room 1724, the Regent Hotel, Kuala Lumpur. SP5 said SP9, SP10, SP12, Suppt. Harris Wong, DSP Mohd Zahari bin Ismail and DSP Yap Seng Hock were also present in the said briefing. In the meeting, SP3 briefed those present that the operation under discussion was a combined operation involving the RMP and the DEA, concerning an anticipated delivery of four kilograms of heroin to the undercover agent (SP15) in Room 1722 on that date (26 March 2000). The drug was expected to be delivered by a black American by the name of Moyo Eshton Mehluli @ Obi. SP5's role was to lead his team (the strike team) to arrest the suspect upon signal being given by SP15. SP15 was introduced to SP5 and his men at about 3 pm on that date. SP5 said, SP3 also had shown him and his men the recording equipment used to record events taking place in Room 1722. SP5 identified P22, P23, P24 and P25 as the equipment shown by SP3.

[52] SP5 said, at about 4.05pm 26 March 2000, he saw on the monitor screen in room 1724, SP15 making a telephone call. SP5 did not hear the actual conversation. At about 7.40pm, SP5 saw on the monitor screen in room 1724 the suspect coming into Room 1722. SP5 identified the accused in court as the suspect. According to SP5, on 26 March 2000 the accused was bald-headed and he had no moustache or beard. According to SP5, he heard the accused telling the SP15 that one kilogram of the stuff was already in Kuala Lumpur and three more kilograms would arrive in two or three days time. The accused told SP15 that he would bring the one kilogram the next day.

[53] At about 9.35pm, SP5 saw SP15 and the accused leaving the room. SP5 said from the earlier briefing, he knew that SP15 was going to show the money kept in a safe deposit box, to the accused. SP5 and his men left the hotel at 10.15pm.

[54] On 27 March 2000, at about 2pm, SP5 and his men, except D/Cpl Wong Hui Leng (SP17) and D/Cpl. Mohd Suffian (SP18), reported for duty at room 1724. SP17 had been directed to make surveillance in the hotel lobby, whereas SP18 was told to make surveillance in the area outside the hotel lobby.

[55] Continuing his testimony, SP5 said, after giving a short briefing, at about 2.15pm SP3 directed SP15 to make a telephone call, which SP5 believed was to the accused. At about 2.30pm, SP5 received a report from SP18 that the suspect was walking towards the hotel carrying a black brief case in his right hand and clutch bag in his left hand. At about 2.35pm, SP17 reported to SP5 that the suspect had entered the hotel lobby and was walking towards the lift. Before entering the lift, the accused was seen using his hand phone. SP17 also informed SP5 that the suspect was carrying a black brief case in his right hand. SP5 said after that he saw on the monitor screen SP15 receiving a telephone call, and SP15 then contacted SP3 to inform SP3 that the accused had arrived at the hotel. At the point, SP5 moved close to the door in room 1724 and peeped through the peephole on the door. About a minute later, SP5 saw the accused crossing in front of his view, carrying a black brief case. SP5 later heard

the sound of the doorbell from Room 1722. SP5 then heard the door of Room 1722 being opened and closed. According to SP5 this happened at about 2.38pm. SP5 said less than two minutes later SP3 gave the signal confirming that the drugs was with the accused. SP5 and his men then stealthily walked to the hallway in front of Room 1722, and waited for the room door to be opened. About a minute later, SP15 opened the door and as soon as SP15 stepped out of the room, SP5 rushed into the room followed closely by his men. In the room (1722), SP5 saw the accused sitting on a chair. SP5 pointed his pistol at the accused and identified himself as a police officer. According to SP5, as the accused was being handcuffed, he saw a clutch bag (P7) and a hand phone (P9) fall onto the floor. SP5 seized both the items. Then, speaking in English, SP5 asked the accused his name. The accused replied that his name was Jowy. SP5 then administered in English the caution provided under s 37A(1)(b) of the Dangerous Drug Act 1952.

[56] Continuing his evidence, SP5 said he seized a black brief case (P6) from the floor. SP5 also seized a plastic bag with 'NICOLE' written on it (P36) on the floor besides the brief case (P6). When they were recovered by SP5, P6 and P36 were about two feet apart on the floor in front of chair on which the accused was sitting. According to SP5, he personally took photographs of those exhibits before he seizing them. He identified photographs P40A and B as the photographs showing the original position of P6 and P36 on the floor when the arrest was made. SP5 said, after seizing P36, he examined its contents in the presence of the accused. SP5 found a WATSON plastic bag (P37) in P36. SP5 next found METROJAYA plastic bag (P38) in P37. SP5 found P38 to contain powdery and granular substances, which he suspected to be heroin. According to SP5, he identified P36 because of his signature on the exhibit and also because he had written the date 27 March 2000 and letter 'A' on it using black ink. SP5 identified P37 because of his signature on the exhibit and also because he had written the date 27 March 2000 and letter 'A1' on it, using black ink. SP5 identified P38 because of his signature on the exhibits and also because of he had written the date 27 March 2000 and letter 'A2' on it using black ink. SP5 identified photographs P40 C and D as the photographs showing P36 and its contents.

[57] According to SP5, he also seized the articles found in P6 and P7. According to SP5 the following articles were found in P6:

(1) 62 business cards (P6A1–62),

(2) 2 tooth brushes (P6A1–2);

(3) 2 tooth pastes (P6C1–2);

(4) A small calculator (P6D);

(5) A bottle of beauty lotion (P6E);

(6) A pen (P6F);

(7) 2 telecom cards (P6G1–2);

(8) 4 Amoxilin pills (P6H1–4).

In P7, SP5 found the following articles:

(a) 400 USD (P7A);

(b) 50 Bhat (P7B);

(c) 5 photographs of the accused (P7C);

(d) A certificate of Insurance in the name Manjoro Jowy (P7D);

(e) MAS airline ticket in the name Jowy Manjoro (P7E);

(f) 10 business cards (P2F1 –10);

(g) A South African passport in the name Jowy Manjoro (P7G);

(h) A note book (P7H);

(i) A nail clipper (P7I);

(j) A key with a tag — Town View Hotel, 102 (P7J).

[58] SP5 prepared a search list of the exhibits recovered by him at scene (room 1722). SP5 then placed P36, P37, P38 containing the substances suspected to be dangerous drugs and other things seized by him [except P7J] in P6. P6 was then carried by him personally. These exhibits remained in his custody and control until he handed them over to the investigation officer (SP2).

[59] At about 4.25pm 27 March 2000 SP5 and his men left Room 1722 5 the Regent Hotel and proceeded to Town View Hotel, Jalan Alor, Kuala Lumpur, bringing the accused with them. SP5 said they went to Town View Hotel because police surveillance made earlier indicated that the accused was staying in that hotel. At Town View Hotel, using the key (P7J), SP5 opened the door to a room. He could not recall the room number or on which floor it was located but the tag at the key showed number 102. There was nobody in the room. Then, in the presence of the accused, SP5 searched the room and seized various items which were listed in the search list (P43) prepared by him.

[60] After completing the search in that room, SP5 and his men took the accused and all the exhibits which had been seized by him seized in the Regent Hotel and Town View Hotel, to the Narcotic Office, Stadium Police Station. There, at about 7.15pm 27 March 2000, SP5 handed over all those exhibits including P36, P37 and P38 [which contained the substance suspected to be dangerous drugs] to the investigation officer, Chief Insp. Kamaruzzaman bin Sulaiman (SP2). A document (Perakuan Serah Dan Terima Barang Kes) (P5A dan B) evidencing the handing over of the exhibits was executed by SP5 and SP2.

[61] Under cross-examination by counsel for the accused, SP5 said Room 1722 Regent Hotel was registered in the name of Tony Adewale. SP5 also agreed that in the briefing SP3 had given the suspect's name as Moyo Eshton Mehluli who was also known as Obi. SP5 agreed that SP3 also referred to the suspect as Bad Man. SP5 said

A he did not know from where SP3 had obtained the name Moyo Eshton Mehluli. Questioned by counsel for the accused about SP15, SP5 said Tunde Taju @ Tony and Tunde Taju Amusa was the same person.

[62] Questioned further by counsel for the accused, SP5 said at the time he and his
B men positioned themselves on the hallway in front of Room 1722, the accused had already entered the room but he did not see the accused entering the room. SP5 agreed that therefore he did not see what was the thing brought into the room by the accused. SP5 said as soon as SP15 stepped out of the room, he and his men rushed into the room.

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[63] Questioned about the reaction of the accused when he pointed the pistol at him, SP5 said the accused kept quiet. Questioned as to how the accused was handcuffed, SP5 said the accused was pulled from the chair and made to lie on the floor. As soon as he was handcuffed, the accused was pulled up by Insp. Ahmad Nizam and he was asked to sit on the bed. Counsel then suggested to SP5 that at that
D point he did not see P36 and P6. SP5 disagreed and said he had seen the exhibits earlier when he pointed the pistol at the accused. Counsel asked SP5 why did not he seize P6 and P36 and the contents then? SP5 said they had to secure the accused first to ensure their safety. Counsel also asked SP5 whether he ascertain that P6 was owned by the accused. SP5 said he did not.

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[64] Other than the matters which I have highlighted, the rest of SP5's evidence remain unchallenged by the defence.

[65] The next witness whose testimony I will refer to is that of DSP Mohd
F Shahrizan bin Che Mat Din (SP12). On 25 March 2000 SP12 was the Head of International Cooperation Unit, Narcotic Department, RMP Headquarters, Bukit Aman. SP12 confirmed that on that date, he attended a briefing by SP3. SP12 said that in the joint operation of the RMP and the DEA, he acted as the liaison officer between the DEA and the RMP. SP12 said on 26 March 2000 he was in the room 1724, Regent Hotel, Kuala Lumpur together with SP3, SP9 and SP10 and a number
G of officers from the RMP. SP12 confirmed that on that date SP3 had installed recording equipment in room 1724. SP12 identified P22, P23, P24 and P25 as the recording equipment. SP12 said on 26 March 2000, he saw on the monitor screen in room 1724, the suspect entering Room 1722 and met SP15. SP12 identified the accused in court as the suspect. SP12 said that on 26 March 2000, the accused was
H bald headed, clean-shaven and well built. SP12 also testified that on 27 March 2000, he witnessed through the monitor screen in room 1724, what transpired in Room 1722 culminating in the arrest of the accused.

[66] SP12 said on 13 April 2000, he received from SP10, two original tapes (P27
I and P29) and two copies of each of the original tapes. P27 was contained in the DEA evidence bag marked 'N1' (P26). P29 was contained in the DEA evidence bag marked 'N2' (P28). SP12 identified P44 as one of the two duplicate tapes of P27. SP12 identified P45 as one of the duplicate tape of P29. SP12 said on 14 April 2000 he handed P27 and P29 in their respective DEA evidence bags (P26 and P28) and P44 and P45 over to SP2. SP12 said that from the time he received those tapes until

the time he handed them over to SP2, the tapes were kept in a steel box in his office and no other person had access to the said steel box. SP12 said he did not tamper or do anything to the tapes whilst they were in his custody.

[67] On 6 April 2000 SP12 received from SP3 two audio tapes — an original and a duplicate. These were the tapes which were used to record the conversation between SP15 and the accused on 24 March 2000, 26 March 2000 and 27 March 2000. SP12 said the duplicate tape was with him. He had however misplaced the original tape.

[68] In cross-examination, SP12 was questioned on the fact that in P34, Room 1722 was registered in the name of Tony Adewale. It was put to SP12 that Tony Adewale was a guest of Room 1722 between 26 March 2000 – 27 March 2000. SP12 disagreed. Re-examined by the DPP SP12 said P34 was written by the occupant of Room 1722, who was Tunde Taju Amusa @ Tony and that Tunde Taju Amusa and Tony Adewale was the same person (SP15). SP12 said he knew this because SP15 and SP9 told him that the name Tony Adewale was used in P34 so as not to compromise the operation, as the accused had the avenue to check.

[69] I come to the evidence of James T Tse (SP10). On 25 March 2000 SP10 was attached to the American Embassy in Kuala Lumpur as a Country Attache of the DEA. SP10 said he was involved in the joint operation of the RMP and the DEA. In the operation, SP10 acted as the liaison officer with the RMP. SP10 said in connection with the operation on 26 March 2000 he was in room 1724 Regent Hotel, Kuala Lumpur together with SP3, SP9 and the officers of the RMP who were involved in the operation. SP10 confirmed that in the operation there was monitoring and recording done on Room 1722. The monitoring and recording was done in room 1724 and the equipment for the same was set up by SP3. SP10 identified P22, P23, P24 and P25 as the equipment used.

[70] On 27 March 2000, SP10 observed on the monitor screen the arrest of the suspect who was identified by him as the accused in Court.

[71] SP10 said on 12 April 2000 he received 2 original tapes (P27 and P29) from SP11. SP10 put his own markings on the two tapes. SP10 marked the tape on 26 March 2000 (P27) 'N1' and the tape on 27 March 2000 (P29) 'N2'. He then placed P27 and P29 in two separate DEA evidence bags and sealed the bags. He then wrote on his name and the date 12 April 2000 on the seals on both the bag. SP10 identified P26 as the evidence bag for P27 and P28 the evidence bag for P29. After marking and sealing the tapes, SP10 kept them in the safe in his office. Only he had access to the safe.

[72] On 12 April 2000, SP10 also received two duplicate tapes of each of the two original tapes from SP11. He then marked the duplicate tapes. On the label for the two duplicates tapes of original tape P27 he wrote the date 26 March 2000. On the label for the two duplicate tapes of the original tape (P29), he wrote the date 27 March 2000. SP10 identified P44 as one of the duplicate tapes of P27. He identified P45 as one of the duplicate tapes of P29. SP10 kept P44 and P45 and the other duplicate tapes in the safe in his office. On 13 April 2000 SP10 handed P27

in P26 and P29 in P28 as well as four duplicate tapes (including P44 and P45) over to SP12. SP10 said he did not tamper or do anything to the tapes. SP10 was no cross-examined by the defence.

[73] This brings me to the evidence of SP11. SP11 worked as an audio visual technician with the American Embassy in Kuala Lumpur until he retired on 1 June 2000. On 12 April 2000, SP11 received two video tapes (P27 and P29) from SP9. SP9 instructed SP11 to make copies of the two original tapes, which SP11 did. SP11 made two copies for each of the original tapes. After the recording was done SP11 handed P27, P29 and four duplicate tapes which he had made over to SP10.

[74] The next witness whose evidence I wish to refer to is that of Sithik Sar (SP13). SP13 was a DEA assistant Country Attache at the American Embassy, Kuala Lumpur. On 1 April 2003, SP13 received two duplicate tapes (P44 and P45) from SP2 in a sealed envelope. According to SP13, SP3 requested him to view the tapes and provide written transcription of the same. After receiving the tapes, SP13 secured them in a safe in his office at the American Embassy Kuala Lumpur. No one else had access to the tape. The next day SP13 began to view the tapes. He started viewing P45 first and made the transcription. SP13 said the picture was good and the sound was audible but he had to watch the tape 2-3 times because of the accent of the person speaking. SP13 made transcription of almost all the conversation recorded in the tape. SP13 produced the transcription made for P45 as P45T (1–8). SP13 said it was a running sequence. Referring to the time 14.36 in P45T, SP13 said it was the time the event was recorded on the tape and that was also the time the event took place. SP13 explained that in P45T, 'AP' was the agent provocateur and 'JM' was the other person in the conversation.

[75] SP13 then viewed P44 and made the written transcription [P44T (1–4)]. SP13 said he concentrated on the portions which he believed to be dealing with the negotiation. SP13 said when he viewed P44, the picture was okay and the sound was audible, but he still had difficulty due to the accent of the two speakers. SP13 also said that in the course of viewing the tapes, he did not do anything to change or alter the tapes. After completing the transcription, SP13 turned over P44, P45, P44T and P45T to SP2.

[76] Under cross-examination, SP13 said he was not involved in. the operation of this case and he was not present at the Regent Hotel on 25 March 2000, 26 March 2000 and 27 March 2000. SP13 said he did not know the name of the parties involved. SP13 agreed that the name Jowy Manjoro was given to him. SP13 also said that when he was requested by the DEA in Kuala Lumpur, he reviewed the DEA case files including this case, but prior to 1 April 2003 he had no knowledge of this case.

[77] Re examined by the DPP, SP13 said when he was assigned to the DEA Country office in Kuala Lumpur in August 2001, he reviewed files of cases which were still open which included this case. That was how he learned about this case but he said that he viewed the tapes, he listened and he transcribed what he heard.

[78] As directed by SP5, on 26 March 2000 SP18 was on duty making surveillance in the area outside the lobby of Regent Hotel Kuala Lumpur. At about 9.35pm he heard a report from SP17 through the walkie talkie that the accused was coming out of Regent Hotel. SP18 then saw the accused walking towards Jalan Alor and entered Town View Hotel which about 100–120 meter from Regent Hotel.

[79] On 27 March 2000 again SP18 was on surveillance duty outside the lobby of Regent Hotel. At about 2.30pm, SP18 saw the accused walking alone from the direction of Jalan Alor, carrying a black brief case (P6) in his right hand and holding a clutch bag (P7) in his left hand. The accused walked towards Regent Hotel and later entered the hotel lobby.

[80] The whole of SP18's evidence was not challenged by the defence.

[81] The evidence of SP17 is that on the direction of SP5 at about 2.30pm on 26 March 2000, she was on surveillance duty in the Regent Hotel lobby. At about 9.35pm SP17 saw the accused and SP15 entered into a room behind the counter at the hotel lobby. About five minutes later SP17 saw the accused and SP15 walked out of that room. The accused then walked out of the hotel. On 27 March 2000 at about 2pm SP17 took up position at the lobby Regent Hotel. At about 2.35pm SP17 saw the accused walking into the hotel lobby through the main entrance of the hotel. SP17 saw the accused carrying a brief case (P6) with his right hand and a clutch bag (P7) with his left hand.

[82] SP17's evidence was not challenged at all by the defence.

[83] SP2 was the investigation officer of this case. Corroborating the evidence of SP5, SP2 said that on 27 March 2000 he received from SP5 the exhibits in this case and the accused. These exhibits are listed in P5A and B. Included in the list of the exhibits received by SP2 were P6, P36, P37 and P38 which contained the powdery and granular substance suspected to be heroin. SP2 put his own markings on P36, P37 and P38 by signing on them using red ink. SP2 kept P36, P37, P38 and its contents in his still cabinet. On 27 March 2000 SP2 carried out his investigation at Room 1722 Hotel Regent. SP2 directed SP1 to take photograph (P7 3A–C) at the scene. SP3 also drew sketch plan of the scene (P17 and P17K).

[84] On 28 March 2000, SP2 directed SP1 to take photographs of P36, P37, P38 and its contents. He identified these photographs as P4. Thereafter on 28 March 2000 at about 2.30pm SP2 sent P36, P37, P38 and its contents to DSP Leow Kam Soon at the office of the Registrar of Criminals Bukit Aman for finger print detection. On 31 March 2000 at about 9.20am SP2 received back the exhibits from DSP Leow Kam Soon. The movement of the exhibits between SP2 and DSP Leow Kam Soon was corroborated by P18, P18A and P18B. After receiving the exhibits from DSP Leow Kam Soon, SP2 kept them back in his steel cabinet under lock and key. On 31 March 2000, SP2 packed P36, P37 and P38 with its contents in an envelope marked 'A' (P31) on which he wrote the police report number (Tun HS Lee 7815/2000) and the date — 27 March 2000. He then sealed the envelope with the seal of the Federation of Malaya Police number 24. On the same date SP2 handed

A the sealed envelope to the Government Chemist, Encik Ismail bin Talib (SP16), at the Jabatan Kimia Petaling Jaya. SP2 was given an official acknowledgement receipt by SP16 (P19). On 9 August 2000, SP2 received back from SP16 the same envelope marked 'A', sealed with the Jabatan Kimia Petaling Jaya number one seal. SP3 also received three copies of the chemist report (P32). On 9 August 2000 SP2 handed the
B sealed envelope marked A (P31) to Lance Cpl. Mustapa bin Othman (SP4) to be registered and kept at the Exhibits Store, District Police Headquarters (IPD) Dang Wangi, Kuala Lumpur. On 7 April 2003, SP2 took P31 from SP4 for the purpose of court proceeding. SP2 returned it back to SP4 on the same day. On 8 April 2003, SP2 took back P31 from SP4. From 8 April 2003 until P31 was produced in court in this trial, SP2 had it kept under lock and key in the still cabinet in his office.
C

[85] In his evidence, SP2 also said that he received from SP12 the two video tapes — P27 and P29 in P26 and P28 respectively. Later SP2 handed the two tapes to SP13 for transcription. SP2 also carried out investigation in respect of the hand phone (P9) which he received from SP5. From the registration card P34 A and B
D which he obtained from Regent Hotel Kuala Lumpur, SP2 found that a number of telephone calls were made from Room 1722 to telephone number 0162960491. Using his own hand phone, SP2 called number 0162960491. The call was received by P9. SP2 therefore concluded that P9's number was 0162960491.

E **[86]** Under cross-examination, SP2 was questioned about P34 which was in the name of Tony Adewale. SP2 said in his investigation he had not met any person by the name Tunde Taju Amusa. Counsel then put to him that therefore he could not say whether Tony Adewale and Tunde Taju was the same person. SP2's reply was that Tony Adewale and Tunde Taju Amusa was the same person. Questioned by counsel how did he know that, SP2 said it was based on the information given by SP3.
F Questioned further, SP2 said even without the information given by SP3 he could still be sure of that based on the information given by Tunde Taju Amusa himself.

[87] Apart from the highlights of the cross-examination which I have just set out, the whole of SP2's evidence remained unchallenged by the defence.
G

[88] I must now refer to the evidence of the Government Chemist (SP16). SP16 testified that he obtained his Bachelor of Science Degree (honours) from Universiti Kebangsaan Malaysia in 1981. In the same year he joined the Jabatan Kimia Malaysia as a Chemist. He was an associate member of the Malaysian Institute of Chemistry.
H He had attended a course on the analysis of dangerous drugs in the Police Science Laboratory, Lyons, France for two weeks in 1995. He had also attended on the job training and had experience in the analysis of various types of dangerous drugs (including heroin) for 14 years. He had also given evidence in the High Courts, Sessions Courts and the Magistrates Court.

I **[89]** On 31 March 2000, SP16 received from SP2 an envelope marked A (P31) sealed with the Federation of Malaya Police 24 seal. He issued an acknowledgement slip with the Laboratory number (PJ) FOR 1937/00–0 (P19) to SP2. SP16 opened the envelope marked A and found it to contain NICOLE plastic bag marked 'A' (P36). SP16 found P36 to contain a WATSON plastic bag marked A1 (P37). SP16

found P37 to contain a METROJAYA plastic bag marked A2 (P38) which contained 777.7 grams of white granular and powdery substance. SP16 carried out analysis of the said substance and found it to contain 630.4gs of heroin, a dangerous drug under the Dangerous Drugs Act 1952. In his evidence SP16 had explained how he carried out the analysis.

[90] Upon completion of the said analysis SP16 packed the remaining heroin in a plastic bag supplied by him and marked with the laboratory no. (PJ) FOR 1937/00-0. He then packed the plastic bag containing the heroin (collectively marked P39), P36, P37 and P38 into the original envelope marked A and sealed the envelope with the Jabatan Kimia Petaling Jaya one seal and kept it under lock and key in the steel cabinet in the strong room of the Chemistry Department Petaling Jaya. On 9 August 2000, SP16 handed the sealed envelope together with the chemist report to SP2.

[91] SP16 was not cross-examined at all by the defence.

THE RECORDING OF THE EVENTS ON 26 MARCH 2000 AND 27 MARCH 2000 IN Room 1722 REGENT HOTEL KUALA LUMPUR

[92] The question before the court was whether the evidence adduced by the prosecution which I have set out, had established a prima facie case of trafficking in dangerous drug against the accused. However, before I dwell further on that, there is another aspect of the evidence adduced by the prosecution which must be dealt with in some details. It is the evidence of the recording of the events in Room 1722 Regent Hotel on 26 March 2000 and 27 March 2000 on the tapes P27 and P29 respectively. Then there is the transcription in P44(T) and P45(T). What is the significance of all this evidence? Although at the end of the case for the prosecution, counsel for the accused changed his earlier stand and stated that he had no objection to the tapes [then ID27 and ID29] to be received in evidence, it was still my duty to decide on the question of the admissibility of the two tapes. So, I will now state what I believe to be the law on the subject. The significance of tape recording evidence was recognised by the English Court of Criminal Appeal in *R v Maqsud Ali* [1965] 2 All ER 464, where Marshall J in delivering the judgment of the court said at p 469:

> We think that the time has come when this court should state its views of the law on a matter which is likely to be increasingly raised as time passes. For many years now photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are untouched. The prints as seen represent situations that have been reproduced by means of mechanical and chemical devices. Evidence of things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted, and now there are devices for picking up, transmitting, and recording, conversations. We can see no difference in principle between a tape recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the

circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged.

[93] The question is whether it is necessary to conduct a trial within a trial to decide on the admissibility of a tape recording. This question was canvassed in *Mohd Ali bin Jaafar v Public Prosecutor* [1998] 4 MLJ 210, where Augustine Paul H (As he then was) after discussing a number of English and Canadian authorities on the subject including *R v Maqsud Ali* and *R v Parsons* [1977] 80 DLR 430, said:

> *In my view, therefore, it is irregular to hold a trial within a trial in order to admit a tape recording in evidence. It is admissible upon being tendered through its maker after proof of the matters referred to in Parsons.* The maker would be the person who participated in the recorded conversation. In this case, it would be the complainant. To hold a trial within a trial to determine such matters would, as Kilner Brown J said in *Stevenson*, lead to the ludicrous situation that in every case where it is alleged that the prosecution evidence is fabricated such an inquiry would have to be undertaken.

I agree with him.

[94] In the Canadian case of *R v Parsons*, the Ontario Court of Appeal held that the evidence to show the integrity, accuracy and continuity of the tapes was relevant and admissible and there was no need to hear it on a *voir dire*. In the course of his judgment, Dubin JA said:

> The Crown's proof as to the integrity of the tape, its accuracy, its continuity and voice identification and that there has been no tampering nor alterations in any way all relate to the proof that the evidence tendered is an accurate reproduction of what it is alleged the person against whom it is tendered said. The weight to be given to that evidence is for the jury and the admissibility of such evidence is not subject to any statutory condition precedent, and should be dealt with in the same manner as any other issues of fact which arise in every jury trial.

[95] In the course of his judgment in *Mohd Ali bin Jaafar v Public Prosecutor*, the learned judge also said:

> The proof of a tape recording, being a documentwithin the meaning of s 3 of the Evidence Act 1950, is governed by ss 61 to 66 of the same Act pursuant to which the recording must be proved by being produced for the inspection of the court or by secondary evidence. Thus the tape recording must be played over in court before it can be admitted in evidence. In determining the admissibility of a tape recording, it is necessary to bear in mind what it is that is being sought to be admitted. This was aptly described in *Butera v Director of Public Prosecutions* [1987] 164 CLR 180 where Mason CJ, Brennan and Deane JJ said at pp 185–186:
>
> > That is not to say that the tape is itself the admissible evidence of what is recorded on it. A tape is not by itself an admissible object for by itself it is incapable of proving what is recorded on it: It is admissible only because it is capable of being used to prove what is recorded on it by being played over. By using sound reproduction equipment to play over the tape, the court obtains evidence of the conversation or other sound which is to be proved; it is that evidence, aurally received, which is admissible to prove the relevant fact.

I also refer to *Conwell v Tapfield* [1981] 1 NSWLR 595 where Street CJ said at p 598: **A**

> What is the best evidence of the sounds entrapped in the record? It seems to me that there can be only one answer to this question, namely the best evidence is the reproduction of those sounds as sounds when the record is played by appropriate sound reproducing equipment. Much of the confusion that has crept into the cases stems from the fact that normally it is the human voice that is recorded and, when reproduced, this is commonly **B** done in writing. But if, say, the relevant evidence was a screech of tyres before a collision and that had been recorded, there would be no denying that the best method of placing this evidence before the court would be by playing the record. There is not the slightest difference in basic principle where the recorded sound is the human voice.

Continuing his judgment, the learned judge said: **C**

> It is perhaps appropriate at this stage to consider the matters that must be established when introducing evidence of a tape recording. They are as follows:
>
> (a) the tape was run through and found to be clean before the recording was made;
>
> (b) the machine was in proper working order; **D**
>
> (c) the tape was not tampered with or altered in any way — it should be established in whose possession the tape was at all times;
>
> (d) the officers (or other witnesses) played the tape over after making the recording and heard voices which they can identify;
>
> (e) transcript was prepared of the voices; if it was just taken down in shorthand and the **E** typed transcript prepared from the shorthand notes then the notes should be saved;
>
> (f) the officers (or other witnesses) played over the recording and checked it with the transcript as to the identity of the voices and as to the conversation.
>
> (See *Canadian Criminal Evidence,* 3rd Ed, by PK Mc Williams QC at pp 7–10). **F**
>
> In addition, the following precautionary steps taken by PW5 ought to be followed:
>
> (1) uttering of the introductory and closing words;
>
> (2) breaking of the safety tabs after the recording; and
>
> (3) placing identification marks on the tapes. **G**

[96] In my view, in the end, the evidence which must be adduced in introducing a tape recording depends on the circumstances of each case. The test is whether there is sufficient material before the court to warrant it to conclude that the recorded sounds reproduce those originally made by the persons identified by the evidence. **H** This was stated by Supreme Court of Victoria in *R v Chen* [1993] 2 VR 139, where Marks, Southwell and Harper JJ in delivering the judgment of the court said at p 150:

> *The test is whether there is sufficient material before the court to allow the tribunal of fact acting reasonably to conclude that the recorded sounds reproduce those originally made by the persons identified by the evidence.* In other word, there must be evidence, which the tribunal of fact **I** is entitled to accept, that the recording is of a conversationwhich occurred and which would be admissible if proved by oral testimony. In our opinion, *admissibility does not depend on the party tendering the tapes having removed absolutely any chance that they are inaccurate.* (Emphasis added).

In fact in *R v Maqsud Ali* Marshall J said at p 469 that:

> There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged.

[97] Reference must also be made to *Taylor v Chief Constable Of Cheshire* [1987] 1 AER 225. In that case the appellant was charged with theft of a packet of batteries from a shop. The prosecution evidence rested partly on what three police officers had seen in a video recording which allegedly showed the appellant committing the offence. The video recording was mistakenly erased before the trial and was therefore not available to be viewed by the justices, who nevertheless regarded the officers' evidence of what they had seen on the video recording as admissible and convicted the appellant. The appellant appealed, contending that the officers' evidence should have been excluded as hearsay. The appeal was dismissed. In his judgment Ralph Gibson LJ, said at p 230:

> As to the submission for the prosecutor, counsel submitted that once it is proved that a video recording was a recording of what a machine detected and reproduced at the time and place in question, *evidence of witnesses of what they say they saw on the recording is not different in law in point of principle from evidence of witnesses who claim to have seen the events bv direct vision.* She contended that all the arguments advanced on behalf of this appellant are in truth arguments properly directed at weight and not at admissibility. I think she adds that they were present to the mind of the justices, and that they were fully taken into account. She has referred the court to no further authority.
>
> In substance I accept the contention made for the prosecutor. *For my part I can see no effective distinction so far as concerns admissibility between a direct view of the action of an alleged shoplifter bv a security officer and a view of those activities by the officer on the video display unit of a camera, or a view of these activities on a recording of what the camera recorded.* He who saw may describe what he saw because, as Ackner LJ said in *R v Kajala*, to which I have referred, it is relevant evidence provided that that which is seen on the camera or recording is connected by sufficient evidence to the alleged actions of the accused at the time and place in question. As with the witness who saw directly, so with him who viewed a display or recording, the weight and reliability of his evidence will depend on assessment of all relevant considerations, including the clarity of the recording, its length and, where identification is in issue, the witness's prior knowledge of the person said to be identified, in accordance with well-established principles.
>
> Where there is a recording, a witness has the opportunity to study again and again what may be a fleeting glimpse of a short incident, and that study may affect greatly both his ability to describe what he saw and his confidence in an identification. When the film or recording is shown to the court, his evidence and the validity of his increased confidence, if he has any, can be assessed in the light of what the court itself can see. When the film or recording is not available, or is not produced, the court will, and in my view must, hesitate and consider very carefully indeed before finding themselves made sure of guilt on such evidence. But if they are made sure of guilt by such evidence, having correctly directed themselves with reference to it, there is no reason in law why they should not convict. Such evidence is not, in my view, inadmissible because of the hearsay principle. It is direct evidence of what was seen to be happening in a particular place at a particular time and, like all direct evidence, may vary greatly in its weight, credibility and reliability.

[98] I now revert to the evidence adduced in this case and set out my finding on the admissibility of the evidence of the recording of the events in P27 and P29 in the light of the various elements which must be established as decided in *Mohd Ali bin Jaafar v Public Prosecutor.*

Whether the tapes were run through and found to be clean before the recording were made

[99] The object of this element is to ensure that the quality of the recording is good. In this connection the evidence of SP3 which I have set out is clear. He testified that he also verified that video cassette recorder was working properly by doing a test recording using a video tape and playing it back to verify that it was recording both the picture and the sound in Room 1722. He said he then rewound the tape and set it at the start position from the beginning. He said he was satisfied that the tape was in good working order. The tape was P27. This evidence of SP3 was never challenged. I accepted it as true. There was no doubt that P27 was run through and was clean and in good working order before recording.

[100] Similarly in respect of P29, SP3 said he recorded this (the event on 27 March 2000) using a brand new blank video tape and the video player P25. He said he had tested the tape and found it to be in good working order. Again this evidence was never challenged by the defence. I accepted it and was satisfied that P29 was run through and was clean and was in good working order before recording.

Whether the recording equipment was working properly

[101] I was satisfied that the equipment used for recording was working properly when they were used to record the events in Room 1722 on 26 March 2000 and 27 March 2000. I accepted the evidence of SP3 that after setting up the monitoring and recording equipment on 26 March 2000, he verified that the equipment was operating properly. He said he verified by looking at the monitor to ensure that he had a picture of what was taking place in the other room (1722). He also verified that the video cassette recorder was working properly by doing a test recording using a video tape and playing it back to ensure that it was recording both the picture and the sound in Room 1722. After doing the verification SP3 was satisfied that everything was in good working order and ready to record.

[102] Similarly on 27 March 2000, as a standard DEA operating procedure SP3 said before recording he had verified the equipment to be in good working order. SP3 said he tested the tape and found it to be in good working order. He also said he also ensured that the video recorder was in good working order. I accept SP3's evidence and concluded that the recording equipment was in proper working order on 27 March 2000.

The tapes were not tampered with or altered in any way

[103] I was satisfied that the prosecution had adduced sufficient evidence to prove this element. All the persons through whose hands P27 and P29 had passed were called by the prosecution. This is clear from the prosecution's evidence which I have

set out. SP3 said after recording stopped on 26 March 2000, he removed the tape (P27) from the video recorder. He then removed the plastic tab from the recording tape. This, according to him was to prevent any one from altering or recording anything additional of the tape. He then placed a label on the tape with his initial, the date and the location the event took place. On 27 March 2000 after recording was completed, SP3 followed the same procedure of removing the tab from the recording tape (P29) to prevent any alteration or additional recording on the tape. He then initialled the label on the tape indicating the date and location of the event. SP3 then handed P27 and P29 over to SP9. This was confirmed by SP9 who testified the two tapes were given to him on 27 March 2000. SP9 took them back to his office at the American Embassy in Kuala Lumpur and secured them in his steel cabinet. SP9 said he did not tamper or do anything to it. In the morning on 12 April 2000, SP9 handed P27 and P29 to SP11 to make copies from the two tapes.

[104] This was confirmed by SP11. SP11 testified that after making copies of the two tapes, (P27 and P29) he handed them over together with the duplicate tapes to SP10 at about 1.30 pm on 12 April 2000. SP10 confirmed that he received P27 and P29 and the duplicate tapes from SP11. SP10 said he then put the marking 'N1' on P27 and the marking 'N2' on P29. SP10 next placed P27 and P29 in two separate DEA evidence bags — P26 and P28 respectively. SP10 then put his name and the date he sealed the tapes — 12 April 2000 on both the bags. After the evidence bags had been sealed, SP10's secretary signed the sticker on both the evidence bags as witnessing official. SP10 said he also made markings on the duplicate tapes. He put video tape label on which he typed the date 26 March 2000 on the two duplicates of P27. He put label on which he typed the date 27 March 2000 on the two duplicates of P29. On 13 April 2000 SP10 handed P27 (in P26) and P29 (in P28) as well as the four duplicate tapes (including P44 and P45) over to SP12. According to SP10 when the tapes were in his custody he did not tamper or do anything to the any of the tapes. At no time did he open the seal on P26 and P28. SP12 confirmed the handing over of the tapes to him on 13 April 2000 as stated by SP10 in his evidence. On 14 April 2000, SP12 turned over P27 (in P26) and P29 (in P28) and two duplicate tapes - P44 and P45 to SP2. SP12 said while the tapes were in his custody, he did not tamper with the tapes. SP2 in his evidence confirmed that he received the tapes as stated by SP12 in his evidence. SP2 said he kept P27 and P29 in the cabinet in his office under lock and key. He said he handed the two duplicate tapes (P44 and P45) over to SP13. In his evidence SP13 confirmed that he received P44 and P45 from SP2 on 1 April 2003. SP3 requested SP13 to view the tapes and provide written transcription of the same, which SP13 did. The transcription of P27 and P29 made by SP13 were produced as P44 (T) and P45 (T) respectively. After completing the transcription, SP13 turned P44 and P45 over to SP2 on 16 April 2003. SP13 said in the course of viewing the tapes he did not do anything to change or alter the tapes. The evidence of all the prosecution's witness in the chain of custody of the tapes was not challenged by the defence. I accepted the evidence as true.

Witnesses played the tapes over after making the recording and heard the voice which they can identify

[105] The playing over of a tape after recording must be to a person who can identify the voices. This can be done by a complainant in the case who had

participated in the conversation. Non compliance with the requirement to identify the voices immediately after the recording is not fatal if it has been sufficiently done so at the trial [see *Mohd Ali bin Jaafar v Public Prosecutor* at p 227. I hold that this requirement had been fulfilled in this case. The whole of both the tapes (P27 and P29) were played in the course of the trial in open court on 24 September 2003 and 25 September 2003. On both the dates when P27 and P29 were played, SP3 and SP15 were present in open court. After P27 and P29 were played in court, the DPP recalled SP15 to give additional evidence with the court's permission. In his evidence, SP15 confirmed that what was shown on the tape (P27) were what happened on 26 March 2000. SP15 also identified the accused and himself on the TV screen.

[106] Similarly, referring to P29, in his evidence SP15 confirmed that whatever he saw on the tape was what had transpired on 27 March 2000. SP15 also identified the accused and himself on the TV screen. None of that evidence was challenged by the defence. I also had viewed the tapes myself when they were played. I have no reason at all to reject SP15's testimony on P27 and P29. I accepted it as true.

[107] Next, the DPP with the court's permission recalled SP3 to give further evidence. As I have set out elsewhere in this judgment, SP3 was present in room 1724 as he witnessed from the monitor screen and recorded live the events taking place in Room 1722 on 26 March 2000 and 27 March 2000. In his further evidence, SP3 confirmed that what he saw and heard on P27 was the same as what had seen and heard on 26 March 2000. SP3 identified the accused and SP15 on the TV screen.

[108] Next, referring to P29, SP3 confirmed that what he saw and heard on P29 was the same as what he had seen and heard on 27 March 2000. SP3 again identified the accused and SP15 on the TV screen. In his evidence, SP3 also identified P36, P37 and P38 as the same plastic bags which he had seen on the monitor screen on 27 March 2000. None of this evidence was challenged by the defence. I accepted it as true.

[109] Thus on the evidence of SP15 and SP3 which I have just stated, I was satisfied:

(a) that the prosecution had proved that the tapes were played over to the appropriate witnesses (SP15 and SP3) who could identify the voices and the picture of the persons recorded on the tapes,

(b) that the prosecution had proved that in respect of both tapes, SP15 (one of the appropriate witnesses) had sufficiently identified:

  (i) the accused's voice and picture recorded;

  (ii) his own voice and picture recorded.

(c) that SP15 had confirmed that what was shown from the playing of both the tapes were the events (including the conversation) which had occurred on 26 March 2000 and 27 March 2000 in Room 1722 Regent Hotel Kuala Lumpur.

(d) that the prosecution had proved that in respect of both tapes SP3 (the other appropriate witness) had sufficiently identified:

(i) the accused's voice and picture recorded;

(ii) SP15's voice and picture recorded.

(e) that SP3 had confirmed that what was shown from the recording of both the tapes were the events (including the conversation) which had occurred on 26 March 2000 and 27 March 2000 in room1722, Regent Hotel, Kuala Lumpur.

[110] I therefore found that the authenticity of the recordings of the material events in Room 1722 Regent Hotel Kuala Lumpur on 26 March 2000 and 27 March 2000 in P27 and P29 have been proved beyond reasonable doubt and I hold them admissible in evidence.

The preparation of the transcripts

[111] It must be stressed that a transcript is admissible not as evidence of the conversation or other sounds recorded but as a means of assisting in the perception and understanding of the evidence by playing over the tape [see: *Williams v The Queen* [1982] Tas R 274; *R v Maclean And Maclean* [1979] 49 CCC 399; *Taylor v Chief Constable Of Cheshire* [1987] 1 AER 225, at 229, and *Mohd Ali bin Jaafar v Public Prosecutor*].

[112] I have set out the evidence of SP13. He said in doing the transcription he started by viewing P45(T) first. He said the picture was good, the sound audible but he had to watch the tape 2–3 times because of the accent of the persons speaking. He said he made transcription of almost all of the tape. As I have said, I have watched the tape [P45T] myself as it was being played. I agree with SP13's observation on the good quality of the picture and the clear sound recorded. I also appreciate his having to view the tape 2 – 3 times because of the accent of the two speakers. Nevertheless, he had produced a transcription, which to my mind substantially reflected what was recorded on P29 of the events taking place on 27 March 2000. I found it to be useful and convenient in assisting me in the perception and understanding of events (including the sounds) recorded on P29. I accepted P45 (T) as admissible in evidence to serve the purpose aforesaid.

[113] In respect of the transcription of P44T, SP13 made the same observation on the good quality of the picture and the clear sound recorded, although SP13 faced the same difficulty due to the accent of the two speakers. SP13 said he viewed P44T 2–3 times. He said he isolated the parts which he believed to be dealing with the negotiation between the A.P and the other person and concentrated on them. I accepted P44 (T) as admissible in evidence as a means of assisting in the perception and the understanding of the recording of the event on 26 March 2000 on P27.

[114] Before ending the discussion on the transcription, there is another related matter which must be dealt with. When SP15 was recalled by the DPP, apart from

seeking confirmation from SP15 on the authenticity of the recording done on the events on 26 March 2000 and 27 March 2000 as well as the identities of the speakers and their voices, the DPP also referred P44 (T) to SP15. SP15 was then asked to explain the meaning of certain paragraphs in the conversation between SP15 and the accused as transcribed on P44 (T). I have allowed most of such questions by the DPP over objection by counsel for the accused. Next, the DPP referred to certain paragraphs in the conversation between SP15 and the accused as transcribed on P45 (T), and asked SP15 to explain the meaning of those paragraphs. Again I have allowed the questions over objection by counsel for the accused. In his submission at the close of the case for the prosecution, counsel for the accused contended that the questions by the DPP should not have been allowed, because by giving explanation SP15 had incorporated additional elements into P44 (T) and P45 (T) and that amounted to tampering with the tapes. He submitted that the Court should consider the tapes without any explanation. With respect I have a different view. In my view, as in the case of the transcription in P44 (j) and P45 (T), the answers given by SP15 to the DPP's questions were admissible, not as evidence of the conversation or other sounds recorded, but as a means of assisting the court in the perception and understanding of the evidence tendered by the playing over of the tape [see: *Williams v The Queen* [1982] Tas R 274; *Taylor v Chief Constable Of Cheshire* [1987] 1 All ER 225; and *Mohd Ali bin Jaafar v Public Prosecutor*]. Support for my view could also be obtained from *R v Maqsud Ali* and *R v Ashiq Hussain*. In *R v Maqsud Ali*, conversations between the two appellants in Punjabi dialect were recorded by the police by a hidden microphone. A detective, who was in the position where he could hear the conversation, could not make out what was said. The tape, after it had been recorded, remained in the custody of the police and there was no suggestion that it was in any way interfered with. The conversation that took place between the two appellants was in their native tongue which was a Punjubi dialect and the tape, had a number of imperfections. First of all, the microphone did not always pick up clearly all that was being said, secondly, the recording was overlaid from time to time by street noises that came through an open window and, in particular, apparently there was a bus stop just under the window. Thirdly, they had, to be of any use in being laid before the jury, to be translated into English and much of the controversy in the case involved the method and the effectiveness or accuracy of the translations that ultimately emerged. On May 2, May 3 and May 13, 1964, a witness, Rahmet Khan, and a Detective Constable Chapman who was able because of his early life in Pakistan to speak Urdu listened in to constant replaying of the recording, and there was a translation first written in Urdu which ultimately resulted from their joint efforts in an English translation. Then on May 18, 1964, Rahmet Khan and another Pakistani, Yar Ahmet Khan, went again carefully through replaying of this tape recording and they together produced first a translation, of such words as they could make out, in Urdu for it was plain that all that was said could not be clearly distinguished. Then later they jointly translated it into English which became one of the important exhibits in the case. Later, in October 1964, a witness by the name of Changuz Khan, listened to many recordings played over from this tape and he ultimately produced an Urdu translation and also an English translation, which was another extremely important exhibit at the trial. Later this tape was made available for translation by witnesses on behalf of the defence and at some time it was played over to both appellants. The appellant Maqsud Ali at the time of its being played over denied that it was the voices of himself or the appellant Ashiq Hussain on the

recording, but the appellant Ashiq Hussain did identify his and the appellant Maqsud Ali's voices. The learned trial judge admitted the tape together with the translation. The question was whether, at the trial of the appellants for murder, the tape recording, and transcript translations of it put before the jury, should have been admitted in evidence. It was held that the evidence of the tape recording was in the circumstances admissible, the trial judge having properly warned the jury of the caution with which they should consider the translations, and the translations were proper to be put before the jury. Moreover, despite the difficulties of language, that the recorder was in substance a mechanical eavesdropper, and that the recording was indifferent, the judge had rightly exercised his discretion by not excluding the evidence of the tape and of the translators.

[115] The Court of Criminal Appeal discussed the difficulties in the recording and the translations in that case. The court said:

> The next matter that the court feels it necessary to call attention to is this, that this recording was complicated to an unusual degree in this particular case by reason, first of all, that it was not in English and, therefore, not directly intelligible to the jury; secondly, it emerged that the Punjabi dialect in which the conversation took place was limited to a particular area in Pakistan; thirdly that there are many such dialects in which the same or similar words have different meanings; fourthly, that some words have a number of different meanings, depending on the context in which they are used; fifthly, that the vocabulary is a limited one, in particular there are no separate words to represent pronouns; sixthly, before translating them into English it had to go into Urdu, the official language of Pakistan, and thence finally into English. This court recognises that all these matters increase the difficulties in this case. They are, however, not satisfied that they are difficulties that could not be overcome. The question here is whether these difficulties were overcome to a reliable extent in this particular case. The defence of course contended that they were not and that the result was thoroughly unsatisfactory and unreliable. They went as far as to suggest that the final translated product was so tainted and so worthless that it ought not to be laid before the jury. The following points arise in this appeal. Is a tape recording as such admissible in evidence as a matter of law? Secondly, is a transcript of a tape recording admissible, as a matter of law, in evidence?

Later in the judgment the court held that:

> It is next said that the recording was a bad one, overlaid in places by street and other noises. This obviously was so and, as a result, much of the conversation was inaudible or undecipherable. In so far as that was so, much of the conversation was never transcribed, but there still remained much that was transcribed, and the learned judge after full argument ruled that what was deciphered should be left for the jury to assess. We think that he was right. Lastly, it was said that the difficulties of language were such as to make any transcription unreliable and misleading. This argument the learned judge treated with great care and circumspection. The recorded conversation was in Punjabi dialect confined to a particular area of Pakistan. He was told that there were many such dialects in which similar words differed in or had more than one meaning that the meaning of sentences often depended on the order of the words, that pronouns were matters of inference and not represented by actual words. Often only parts of sentences were decipherable owing to the other extraneous noises. He decided, before admitting the evidence, to have a trial within a trial in which translators were called by both sides which, I think I am right in saying, lasted 2 1/2 days. All matters were canvassed in very great detail. He discovered that there were certain passages common to translations and, in the end, he decided that it was a

question which should be left to the jury, but he did not think 'this evidence was so unsatisfactory that I should withdraw it from the jury'. A

On the question of transcription, the court said:

Provided that a jury is guided by what they hear themselves and on that they base their ultimate decision, we see no objection to a copy of a transcript, properly proved, being put before them. B

[116] From the facts of the case in *R v Maqsud Ali* which I have outlined the trial judge admitted and placed before the jury not one translation, but a number of them. There was a translation made by one Rahmet Khan and DPC Chapman after constant replaying of the tape, which was first written in Urdu from which they C jointly worked out an English translation. Then there was a translation made in Urdu by Rahmet Khan and Yar Ahmet Khan after careful replaying of the tape. Later they jointly translated that Urdu translation into English. There was also an Urdu translation and an English translation made by Changuz Khan after listening to many recordings played over from the tape. All those translations were made by persons who did not take part in the conversation recorded. More importantly, some D of the translations were made not directly upon replaying of the tape, but from translations made earlier in different language. So, the later translations would have been the result of the translators' interpretation and impression of the words spoken in the conversation as transcribed in the earlier translations. If such interpretation and impression of the words transcribed in the earlier translation could be allowed, E I do not see why SP15's explanation of certain passages in the P44 (T) and P45 (T) could not be admitted. If certain words, though spoken in English were deliberately used in a certain way by the parties concerned to convey certain intended meanings which were understood by them alone, are the parties or any of them not allowed to explain in the court of law the meaning of the words used? If parties to a clandestine F deal had used code words, the meanings of which were understood only by them, is the Court not entitled to hear evidence on the meanings of those code words as understood by them? In my view, the interest of justice warrants that such evidence be placed before the court and in such a case the evidence given by any of the parties would be the best evidence. In the case before me other then accused, SP15 was the best witness who could explain the meanings of the words spoken by him and the G accused when both of them met in Room 1722 on 26 March 2000 and 27 March 2000. As I have said the explanation by SP15 was admitted not as evidence of the conversation between him and the accused, but only a means of assisting the court in the appreciation and understanding of the evidence tendered by playing over of the tape. The real evidence of the events which took place in Room 1722 Regent Hotel H Kuala Lumpur on 26 March 2000 and 27 March 2000 [which include the conversation between SP15 and the accused] are the recordings in the two tapes (P27 and P29).

SUBMISSION OF LEARNED COUNSEL FOR THE ACCUSED AND COURT'S FINDINGS AT THE CLOSE OF THE CASE FOR THE PROSECUTION I

[117] The first point raised by counsel for the accused in his submission of no case to answer was the name of SP15 and the fact that in P34 the name registered was

Tony Adewale. The thrust of counsel's submission was that throughout the proceeding in this case, the name Tunde Taju was used to refer to SP15 and that the prosecution had failed to prove that Tunde Taju and Tony Adewale was one and the same person. He said, in the briefings on 25 March 2000 and 26 March 2000, SP15 was introduced by SP3 as Tunde Taju. Thereafter, SP15 was referred to by all the police officers and indeed by the DEA officers as Tunde Taju @ Tony. Counsel said the RMP officer never knew SP15 by any other name. Counsel said the identity of SP15 was a very important issue. Yet when Ghazali bin Hussin (SP6) and Haslin bin Mohamed (SP8) gave evidence, the prosecution did not ask any of them to identify SP15's photograph (P21). Counsel also submitted that, after SP15 came to court to give evidence, SP6, SP7 or SP8 was never recalled to identify SP15 — whether as Tunde Taju or Tony Adewale. I do not think there is any merit in that submission. In this case SP15 himself who had come to give evidence said that his name was Tunde Taju. He also testified that his other names were Amusa and Tony. When counsel put to him that particulars in P34 were particulars of another person occupying Room 1722, SP15 said that it was he who was occupying Room 1722 with a different information given by him when he registered at the hotel in order to protect his identity and safety because of the nature of the drug business. According to him, that information also would protect him when he leave the country so that it would prevent anybody from following him and endanger his life. He said the information he wrote on P34 was solely for the purpose of the drug deal in this case and that Tony Adewale had been his undercover name. He also denied suggestion by counsel that he could have another friend by the name of Adewale registered in Room 1722 between 26 March 2000 and 27 March 2000. I accepted this evidence and in my view that evidence is sufficient to counter counsel's submission. If any corroboration was necessary, it was amply provided by the evidence of SP9, SP12 and SP2. In his evidence under cross-examination, SP9 had firmly stated that Tony Adewale and Tunde Taju and Tony was the same person. In his evidence under re examination, referring to the particulars written on P34, SP12 said that what was written on P34 was written by the guest of Room 1722, who was Tunde Taju Amusa @ Tony (SP15), and that Tunde Taju Amusa and Tony Adewale was the same person. SP12 also said SP15 and SP9 had told him that the name Adewale was used so as not to compromise the operation. The evidence of SP2 under cross-examination also showed that Tunde Taju, Tunde Taju Amusa and Tony Adewale was the same person. Then there is evidence of SP3. When asked by the DPP in re examination whether he did see any other Nigerian in Room 1722 on 26 March 2000 or 27 March 2000, SP3 said he only saw the accused and Tunde Taju who was a Nigerian and that those were the only two persons in the room. In the light all this evidence, there was no doubt in my mind that there was in fact no other person by the name of Tony Adewale. The name Tony Adewale and the particulars on P34 were written by SP15. The name Tony Adewale was an undercover name used by SP15 for the purpose of the drug deal with the accused.

[118] Counsel for the accused next raised the issue relating to the name Moyo Eshton Mehluli. The crux of his submission was that the accused was charged as Jowy Manjoro and there was no other name mentioned in the charge, and that all his personal documents such as his passport showed that the accused's name was Jowy Manjoro. Continuing his submission, counsel said SP3 in his evidence had given the name of the suspect as Moyo Eshton Mehluli @ Bad Man @ Obi, but he had never

identified the accused as Moyo Eshton Mehluli @ Bad Man @ Obi. Learned counsel admitted that SP3 had identified the accused in the dock but he said SP3 had not identified him as Moyo Eshton Mehluli. This, counsel appeared to contend was insufficient, as the identification of the accused in the dock was only recognition of the accused as a person, but not as a person by the name of Moyo Eshton Mehluli. Counsel then said that when he was arrested, he was never asked whether he was Moyo Eshton Meluli. In fact counsel submitted that none of the prosecution witnesses knew the accused's name was Jowy Manjoro and that was why upon his arrest the police officers had to asked him for his name. As a subsidiary point, counsel also pointed out that SP15 did not know who was Moyo Eshton Mehluli or Bad Man and that SP15 could not recognise the accused in the photograph in D46; yet he was able to identify the accused in the dock. In support of the submission on the failure to identify the accused person as Moyo Eshton Mehluli, counsel cited *KS Roberts v Public Prosecutor* [1970] 2 MLJ 137, *Muharam v Public Prosecutor* [1981] 1 MLJ 222 and *Yau Heng Fang v Public Prosecutor* [1985] 2 MLJ 335.

[119] Admittedly, identification is a fact or circumstance which must be proved against an accused person before it can be relied upon or used against him (see *KS Roberts v Public Prosecutor* [1970] 2 MLJ 137). However, on the facts, the cases cited by counsel for the accused are very different from the case before the court. In *KS Roberts*, the police constable who raided the accused's shop and saw the impugned publication, failed to identify the accused in court, although there was evidence to show that the business licence seized from the shop disclosed the name of the accused. In *Yau Heng Fang v Public Prosecutor*, the Supreme Court held that the testimony of identity witness in the case on the issue of identity was inherently incredible due to the poor opportunity for the eye-witness to recognise the appellant and their poor quality as identity witnesses. In *Muharam v Public Prosecutor*, the alleged offence was committed at night. The evidence of visual identification of the accused was challenged on the ground that there was a possibility that the accused had been wrongly identified. The two identity witnesses in that case saw the accused for a few seconds when they flashed the torchlight on his face, from a distance of 15–18 feet away. In the case before me, from the evidence adduced by the prosecution, at the end of the meeting with SP15 on 27 March 2000 in Room 1722 Regent Hotel, Kuala Lumpur, the accused was caught red handed by SP5 in the room with the incriminating exhibits only about two feet away from him. Since his arrest, the accused was in remand. In his evidence, SP15 had testified that he came to Kuala Lumpur for the purpose of buying dangerous drug from a person he knew as Obi and SP15 also said he came on the instruction of the DEA. Thereafter, SP15 testified that he met Obi in Jakarta on 15 March 2000, and then narrated what transpired between him and Obi on that date. SP15 then gave evidence about the briefing given by SP3 on 25 March 2000. Essentially, his evidence about this briefing was 'how we will go with operation of buying drug from Mr Obi'. He then gave evidence about another briefing on 26 March 2000, after he had checked in to Room 1722. In that briefing, SP15 said the RMP officers asked him, 'what would be the signal for them to know that Obi has drugs to sell to me'. Then SP15 gave evidence that he telephoned Obi and waited for Obi in Room 1722 for almost three hours before he made the second call. SP15 next testified about Obi's arrival at Room 1722 on that date (26 March 2000) and what transpired between him and Obi in that room. Then, SP15 said he could identify Obi and he pointed to the accused in the dock. In doing so he had

positively identified the accused as Obi. SP15 then went on testifying about meeting the accused again in Room 1722 on 27 March 2000 and what transpired between him and the accused, until he finally opened the room door for SP5 and the strike team to come in.

[120] SP5's evidence was that in the briefing by SP3, he was told that the suspect was a Black American named Moyo Eshton Mehluli @ Obi whom SP3 called Bad Man. SP5 testified that on 26 March 2000 at about 7.40pm he saw through the monitor screen in room 1724, the suspect coming to Room 1722. He then identified the suspect as the accused in the dock. SP5 then narrated what transpired between the accused and SP15 on that day. SP5 also gave evidence that on 27 March 2000, at about 2.38pm he saw through the peephole at the door in room 1724, the accused passing by in front of the door carrying a black brief case. SP5 then gave evidence that as soon as SP15 stepped out of Room 1722, he rushed into the room and arrested the accused. So, SP5 also had positively identified the accused as the person he arrested in Room 1722 on 27 March 2000. SP9 in his evidence said on 25 March 2000 he had attended a briefing with the RMP and discussed the drug trafficking activity of a suspect by the name of Moyo Eshton Mehluli. He had given evidence that at about 7.40pm on 26 March 2000, as he was watching the monitor screen in room 1724, he saw the suspect meeting SP15 in Room 1722. He then narrated what happened in that room between SP15 and the suspect. He identified the suspect as the accused in the dock. SP9 also gave evidence that on 27 March 2000 at about 2.40pm, he witnessed the accused enter Room 1722 carrying a brief case. SP9 then narrated what he saw happen in that room between SP15 and the accused. SP9 also testified that at about 2.43pm, as SP15 exited Room 1722, SP5 rushed into the room and arrested the accused. So, clearly SP9 also had positively identified the accused as the person arrested by SP5 on 27 March 2000 and that person was the suspect he referred to earlier as Moyo Eshton Mehluli. SP10 and SP12 who had also witnessed (through the monitor screen in room 1724), what transpired in Room 1722 on 26 March 2000 and 27 March 2000, also positively identified the accused in the dock as the person who had met SP15 in Room 1722 on 26 March 2000 and 27 March 2000.

[121] In the evidence of SP3 the name Moyo Eshton Mehluli was first mentioned when he testified about briefing the police on 25 March 2000. SP3 said 'I briefed the police on the ongoing project concerning a suspect that I knew as Movo Eshton Mehluli also known as Obi also known as Bad Man'. Thereafter in his evidence, SP3 had used the word 'the suspect'. The suspect mentioned by SP3 several times in his evidence referred to this particular suspect whom SP3 said he knew as Moyo Eshton Mehluli also known as Obi also known as Bad Man. There was no other suspect. When he identified the suspect as the accused in court, he was referring to this particular suspect whom he said he knew as Moyo Eshton Mehluli also known as Obi also known as Bad Man. SP3 then gave evidence on his observation about what the accused did on 26 March 2000 and 27 March 2000 in Room 1722 until his eventual arrest by SP5. Thus, SP3 had positively identified the accused as the person who met SP15 in Room 1722 Regent Hotel on 26 March 2000 and 27 March 2000, and was arrested by SP5. I must add that in doing so, SP3 had also in fact identified the accused as the person he knew as Moyo Eshton Mehluli also known as Obi and also

known as Bad Man. So, in the light of the overwhelming evidence which I have just set out, I cannot accept counsel's contention that the accused in the dock was not identified as Moyo Eshton Mehluli. I must reiterate that on the issue of identity, the important thing I had to consider was whether the prosecution had proved beyond reasonable doubt that the accused in court was the same person who was arrested by SP5 in Room 1722 Regent Hotel Kuala Lumpur on 27 March 2000? My answer is it had. It had also proved that the accused was the same person whom SP15 met on 15 March 2000 in Jakarta and again on 26 March 2000 and 27 March 2000 in Room 1722 Regent Hotel Kuala Lumpur. In my view once the accused has been proven as such, it does not matter if the accused was known earlier by prosecution witnesses by so many names other than his real name which was stated in the charge.

[122] Counsel for the accused next submitted on that the tendering of the photographs of the incriminating exhibits together with the photographs of the accused (in P40), which he said was highly prejudicial and contended that by doing so the prosecution wanted to show the accused guilty. I do not agree. Unlike the photographs shown to the jury in *Lai Ah Kam v Rex* [1939] MLJ 306 and *Girdari Lall & Ors v Public Prosecutor* [1946] MLJ 87 which were cited by learned counsel in support of his submission, there is nothing on the photographs of the accused in this case (P40K–L) to show that the accused had been previously convicted. I do not see how putting together the accused's photographs (P40K–L) together with the photographs of the incriminating exhibits in this case (P40A–J) had the tendency to show that the accused was guilty. Similarly, I cannot accept counsel's contention that SP3's use of the name Bad Man to refer to the accused tended to show that the accused was a person of bad character and this was highly prejudicial. Upon consideration of SP3's evidence I accept the DPP's submission that 'Bad Man' was another name by which the accused was known to SP3. I do not agree that the use of 'Bad Man' by SP3 had the tendency to show that the accused was guilty of the offence. Besides, I have always warned myself that irrespective of whether I am otherwise convinced in my mind of the guilt or innocence of the accused, my decision must be based on the evidence adduced and nothing else.

[123] Learned counsel then submitted on the failure on the part of the prosecution to produce in evidence the concealed camera which was installed and used by SP3 to record the events in Room 1722 on 26 March 2000 and 27 March 2000. Counsel argued that SP3 could not use P20 as an excuse not produce the camera in this case (being a criminal trial), and counsel urged the court to invoke the adverse inference under s 114(g) of the Evidence Act 1950.

The diplomatic note (P20) reads as follows:

> The embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs of Malaysia and has the honour to refer to the High Court proceeding case number 45–55 of 2000 in Kuala Lumpur High Court against Jowy Manjoro and to the request for Mr Michael Horan, Mr. James Tse, and Mr. Larry Sproat of the Drug Enforcement Administration (DEA), United States of America, to provide testimony for the prosecution.

Mr. Horan was assigned to the DEA Kuala Lumpur, Malaysia, Country Office during the period of July 5, 1998 through Jun 13, 2001. On June 14, 2001 Mr. Horan departed Malaysia at the completion of his assignment.

Mr Tse, Country Attache', DEA Beijing Country Office, was assigned to the DEA Kuala Lumpur Country Office during the period of December 6, 1998 through August 24, 2001. On August 24, 2001, Mr. Tse departed Malaysia at the completion of his assignment.

Under art 39(2) of the Vienna Convention on Diplomatic Relations, Mr. Horan and Tse retain immunity with respect to acts performed in the exercise of their functions as a Member of the Mission. Thus, they are not obliged to provide evidence as a witness in this matter.

Given the circumstances of this case, and in the spirit of cooperation, also in response to the Foreign Ministry's request (CU 108/2003) the United States Government expressly waives Mr. Horan and Tse's residual official acts immunity for the limited purpose of permitting them to appear before the Kuala Lumpur High Court during the period of April 7–25, 2003, to testify as to their knowledge as specified, and for no other purpose. Mr Horan's testimony will pertain to the rental of the undercover and surveillance rooms at the Regent Hotel, Kuala Lumpur, and the surveillance of the DEA money flashroll operation that subsequently led to the arrest and seizure. Mr Tse's testimony will pertain to the witnessing of the sealing of video cassette tapes in the evidence bags, their safekeeping, and turning their custody over to the Royal Malaysian Police.

Under this limited waiver of immunity, Mr. Horan and Tse will not be permitted to testify about sensitive investigative techniques, the use of confidential sources, or any other classified matters, unless specifically authorized in whole or in part to do so by appropriate DEA authorities. They will not be permitted to testify about security measures.

The United States Government also authorizes Mr Sproat, DEA, to appear before the Kuala Lumpur High Court during the period of April 7–25, 2003, to testify as to his knowledge as specified, and for no other purpose. Mr. Sproat's testimony will pertain to the installation and monitoring of concealed audio/video equipment in the undercover room where defendant was arrested. As Mr. Sproat was assigned to DEA Singapore Country Office at the time of the operation, a waiver of immunity is not necessary in order for Mr. Sproat to testify. However, the same restrictions noted above for Mr. Horan and Tse's testimony also will apply to Mr. Sproat's testimony. Mr. Horan, Tse, and Sproat will also provide testimony regarding the processing of the audio/video tape evidence and its chain of custody.

The United States Government also expressly waives the inviolability of the premises of the Mission under Article 22 of the Vienna Convention on Diplomatic Relations, for the limited purpose of permitting Mr. Horan, Tse or Sproat to make available to the Court the monitoring and video taping equipment that was used during this operation.

The Foreign Ministry is requested to inform the Kuala Lumpur High Court of these limited waivers of residual official acts immunity and the limited waiver of the inviolability of the premises of the mission.

[124] It is of course, well settled that in a criminal case the prosecution, provided that there is no wrong motive, had a discretion as to whether or not to call any

particular witness and in particular has a discretion not to call in support of its case a witness whom it does not believe to be a witness of truth [see *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105, 109 (CA), *Adel Muhamed El Dabah v Attorney General Of Palestine* [1944] AC 168, *Public Prosecutor v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1, at pp 70–71)]. Thus, in my view, the prosecution also has a discretion whether or not to introduce any particular evidence at its disposal and to decide how its case is to be presented. However, that prosecutorial discretion must be subject to the most basic limitation that it has to produce all the necessary evidence to prove the case against the accused beyond reasonable doubt [see *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16, at 19, (SC)]. Thus, in *Teoh Hoe Chye v Public Prosecutor* [1987] 1 MLJ 220, Abdul Hamid C.J (Malaya) (As he then was) said at p 229:

> Nevertheless, the decision whether to call or not to call a witness including a witness from whom a statement has been takes is always the right of the prosecution (*Abdullah Zawawi v Public Prosecutor*). Insofar as the trial Court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi*'s case).

[125] Reverting to the case before me, I do not think the failure to produce the concealed camera installed by SP3 in Room 1722 Regent Hotel, Kuala Lumpur had caused any gap in the prosecution's case resulting in failure on its part to discharge the burden of proving the case against the accused. In my view, just as it is not necessary to produce the camera which was used to take photographs in a case, it is also not necessary to produce the concealed camera in this case. In any case, I find that the evidence of prosecution's witness relating to the installation of the concealed camera in Room 1722 and the installation of the complementary equipment (P23–P25) in room 1724 was never challenged by the defence. It was never even suggested to SP3 or any of the prosecution/s witnesses that the camera was never installed or that it was faulty or failed to function. Having done maximum evaluation of the credibility of SP3, SP9, SP10, SP5, SP12 and SP15 I accept their evidence and I was satisfied on their evidence that the prosecution has proven as a fact that a concealed camera was installed by SP3 in Room 1722 Regent Hotel Kuala Lumpur on 26 March 2000 and that using the camera and P22, P23, P24 and P25 (which were installed in room 1724), SP3 had recorded the events occurring in Room 1722 on 26 March 2000 in P27 and on 27 March 2000 in P29. As would be clear in this judgment, the evidence produced by the prosecution in this case (without the concealed camera) has successfully established a prima facie case against the accused. Similarly, the non production of the document on the rental of the safe deposit box at Regent Hotel Kuala Lumpur also does not attract the presumption under section 114(g) of the Evidence Act as I accept the evidence of SP9 and SP3 that 56,000 USD was placed in a safe deposit box located at the lobby of Regent Hotel Kuala Lumpur.

[126] I had made maximum evaluation of the credibility of all the prosecution's witnesses who had given evidence in this case, and I will now state whether, having done so I was satisfied that the prosecution had made out a prima facie case — a case which if unrebutted would warrant a conviction [see *Public Prosecutor v Dato' Seri*

Anwar Ibrahim (No 3) [1999] 2 MLJ 1, at 63-64, which had received approval sub silento from the Federal Court ([2002] 3 MLJ 193).

[127] When I set out the evidence of the witnesses for the prosecution, I have also highlighted the matters on which they were cross-examined by learned counsel for the accused. However, I was aware that being unshaken or otherwise was not the acid test [see *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257, 258, (FC)]. The inherent probability or improbability of the fact in issue had to be considered by me. I also have not forgotten learned counsel's contention that there were contradictions and exaggeration in their evidence [especially the evidence of SP3 and 10 SP15].

[128] Learned counsel pointed out that in his evidence, SP3 said he observed the suspect discussing with SP15 that he had 1 kilogram of heroin already in Kuala Lumpur and was expecting the remaining three to be delivered in Kuala Lumpur by Tuesday or Wednesday. Learned counsel said similar evidence about the quantity of heroin was also mentioned by SP9 and SP15 in their evidence on the meeting between SP15 and the accused. But he said when P27 and P29 were played, the word 'drug' was not heard at all in the conversation, let alone the quantity. Similarly, learned counsel said no such thing was recorded. Elaborating on this point, learned counsel said the word 'stuff' [which SP15 said he had used at certain point in the conversation] and the words 'mangoes' and 'apples' [which SP15 said were sometimes used in dangerous drug deals] were also not heard when P27 and P29 were played, and no such words appeared in P44T and P45T.

[129] On the absence of the word 'drug' or 'heroin' being used in the conversation on 26 March 2000 and 27 March 2000, SP15 had explained that, 'in the drug business you do not mention the word drug, otherwise people will suspect you to be a police officer or undercover agent. In this particular case, I used the word 'stuff'. Maybe one or two times with him. That is the way it is in the drug business. ' I accept this explanation. Even if the word 'stuff', which SP15 said he had used at certain point in the conversation with the accused, was not heard in the playing of P27 and P29, I do not think that this point alone was sufficient to destroy SP15's credibility or change the true nature and purpose of the meeting between SP15 and accused on 26 February 2000 and 27 March 2000. To my mind, in deciding whether the conversation between SP15 and the accused was a dangerous drug deal or an innocent chat between two acquaintances, the events which transpired in Room 1722 on 26 March 2000 and 27 March 2000 must be looked at in totality and in continuity, not forgetting the fact that on 27 March 2000, immediately after SP15 left Room 1722 after meeting the accused, the accused was arrested in that room and the substance [confirmed later to be heroin] was recovered in the room. Having done so there was no doubt at all in my mind that the conversation must be about the heroin eventually recovered by the police. In any case, when P27 was played, the word 'stuff' appeared at 21.13.40 on 26 March 2000 (About 9.13pm).

[130] Admittedly, the word 'one kilogram', 'four kilogram', 'three kilogram', 'remaining three', 'USD56,000' were not heard in the recording of the events on 26 March 2000 and 27 March 2000 in P27 and P29 respectively, but then SP3 and SP9 were not giving evidence of the exact words spoken by SP15 and the accused.

When they testified about the conversation on 26 March 2000 they were giving a summary by paraphrasing the substance of the conversation between SP15 and the accused, which had lasted almost two hours. I do not think their mistake or inaccuracy in mentioning those figures and the word 'heroin' when they related the conversation on 26 March 2000 had affected their credibility. It must be also remembered that the conversation was intelligible in various parts. Having viewed and heard P27 myself and with P44T as a guide, even without SP15's explanation of certain parts of the conversation as transcribed in P44T, I came to the inevitable conclusion that on 26 March 2000, when he met SP15 in Room 1722, the accused told SP15 that he already had part of [something] for SP15 and that the rest [of that thing] would be brought to SP15 the next day. The last page of P44T made this clear:

JM: So, to this night or tomorrow morning I'm going to bring *this one* for you. You understand me, you take everything see.

AP: For which *one*?

JM: For the *one that*is here already.

AP: *The one* that is here.

JM: Yes.

AP: You're going to bring *that one.*

JM: Tomorrow.

AP: Tomorrow, okay, no problems. Time end at 21:19:10

[131] Considered in the light of the rest of the evidence adduced in this case, there was no doubt in my mind that the thing which was referred to as 'this one', 'the one' and 'that one' in that passage was heroin.

[132] That in substance was what SP3, SP9 said in their evidence about the conversation between SP15 and the accused on 26 March 2000. Similarly, when SP15 testified about the conversation on 26 March 2000, he was giving a summary of what transpired about 4 years ago in the meeting between him and the accused which lasted almost two hours. In the circumstances, I do not think that certain mistakes or inaccuracy in his evidence when he summed up his conversation with the accused, had affected his credibility. In my judgment, SP15 had summed up in his evidence the gist of what was discussed between him and the accused.

[133] In his submission learned counsel also submitted on the character of SP15 whom he described as a person of dubious character. Learned counsel wanted the court to take into consideration the fact that SP15 had served a sentence of 10 months imprisonment for fraud and conspiracy to commit bank fraud. Learned counsel also submitted that SP15 had perjured himself when he admitted that he had written false particulars in P34. With respect I cannot agree. SP15 had given the reason why he wrote the name Tony Adewale in P34. He said it was his undercover name which was deliberately used in the operation to protect himself. This was corroborated by SP9 in his evidence.

[134] The fact that SP15 had been convicted and had served a term of imprisonment did not mean that his evidence could not be believed. In my view, in the absence of material contradiction and in absence of any inherent improbability, his evidence should be accepted. Even his role as an agent provocateur in this case had not made him a witness who was unworthy of credit. Indeed, s 40A(1) and (2) of the Dangerous Drug Act 1952 provides that no agent provocateur shall be presumed to be unworthy of credit by reason of his having abetted the commission of an offence by any person under the Act, if the abetment was for the sole purpose of securing evidence against such person. Similarly, any statement, whether oral or in writing made to him by the accused person shall be admissible as evidence at his trial. There is no requirement for the evidence of an agent provocateur to becorroborated [see*Namasiyam & Ors v Public Prosecutor* [1987] 2 MLJ 336 at 343 (SC)].

[135] Learned counsel then submitted on a contradiction between SP15's and SP5's evidence. In his evidence in examination-in-chief, when the photographs P40C and D were shown to him SP15 said, 'When I left the room, everything was on the table the way I left it. I can see with these pictures now (P40C and D). This is the way I left the bags and the drug on the table when I left the room.' Learned counsel submitted that that evidence contradicted the evidence of SP5 when he said that photographs P40C and D showed the contents of the Nicole plastic bag (P36) which he had taken up from the floor and placed on the table for examination of the contents of the METROJAYA plastic bag (P38):

> Gambar C dan D adalah kandungan beg plastik NICOLE yang saya bawa dan lantai (seperti dalam gambar B) ke atas meja, untuk pemeriksaan ke atas kandungan beg plastik cap METROJAYA.

[136] Admittedly there was a contradiction. But then under cross-examination, when counsel asked SP15 whether he was absolutely sure about his evidence in examination in chief regarding the position of the bags as shown in P40C and D when he left the room, SP15 said, 'I am not absolutely sure but I believe this is the way I left the bags and the drugs when I left the room. They were left on the table when I left the room.' So, in my view SP15 was not really sure about that part of his evidence. It was a flaw in recollection, not a deliberate lie. In the circumstances, I accept the evidence of SP5 that he had taken the NICOLE plastic bag (P36) and contents from the floor and place them on the table in the position as shown by P40 C and D. Further, in my view this contradiction only concerned the evidence of SP15 regarding the position of the bags after they were delivered by the accused into the room. This contradiction did not in any way affect the more vital parts of the rest of SP15's evidence, particularly his evidence on the accused entering into Room 1722, carrying a brief case bag, telling SP15 that he had the drugs in the brief case, and delivering P36 which was contained in P37, which in turn contained P38 which was found to contain the heroin. After having seen SP15 giving evidence and considering SP15's evidence in totality and after having considered it in the light of all other evidence, I accept his evidence except on the point which was different from SP5's evidence.

[137] Similarly, after having observed the way they gave their evidence and after having considered their evidence in totality [including their evidence under cross examination] and testing them with all other evidence available I accepted all the prosecution witnesses as witnesses of the truth.

[138] Earlier in this judgment, I have set out the evidence of SP16 and said that SP16 was not cross-examined at all by the defence. Indeed in the course of the trial, learned counsel informed the court that defence did not dispute the weight and the identity of the dangerous drug in this case. Nevertheless, I had considered the evidence of the SP16. After having considered his qualification and experience, I accepted him as an expert who was competent to testify on the analysis of dangerous drugs in this case. SP16 had given evidence explaining how he had done his examination and analysis of the white granular and powdery substance in P38, which I had considered. I accepted his evidence on his analysis and his conclusion that the white granular and powdery substance in P38 contained 630.4gs of heroin which was a dangerous drug as defined under the Dangerous Drugs Act 1952. The prosecution had therefore established the weight and identity of the dangerous drug in this case.

[139] Upon considering the evidence adduced by the prosecution I had no doubt that the heroin produced in court in this case was the heroin found in P38 by SP5 on 27 March 2000 in Room 1722 Regent Hotel, Kuala Lumpur. P38 was found in P37. The witnesses concerned, in particular SP2, SP5, SP15 and SP16 had positively identified P36, P37 and P38 (which contained the heroin). SP5 was able to identify P36, P37 and P38 which contained the heroin from the markings he had made on those exhibits. I was satisfied that there was no break in the chain of evidence relating to custody of the heroin in this case.

[140] On the element of trafficking, I found that the evidence of SP15 which was corroborated by the evidence of SP3, SP9, SP10 SP12, SP5, SP2, SP17 and SP18, which I had set out earlier in this judgment, even without the evidence of recording of the events of 26 March 2000 and 27 March 2000 in Room 1722 in P27 and P29 respectively, was more then sufficient to establish the act of trafficking in the 630.4g of heroin in this case. But in this case as an additional evidence, there is the evidence of the recording of the events on 26 March 2000 and 27 March 2000 in P27 and P29 respectively. When I viewed P27 and P29 as they were played on the TV screen, I was in the position as though I was there together with SP3, SP9, SP10, SP5 and SP12 in room 1724 watching and listening to what SP15 and the accused were doing in Room 1722 Regent Hotel Kuala Lumpur on 26 March 2000 and 27 March 2000. Having considered all this evidence, it was my finding that as a result of their meeting in Jakarta on 15 March 2000, SP15 and the accused met again in Room 1722 Regent Hotel Kuala Lumpur on 26 March 2000. In that meeting the accused told SP15 that he already had one kilogram of heroin which he said he would deliver to SP15 the next day. After that meeting, SP15 and the accused went down to the hotel lobby where at about 9.30 pm on 26 March 2000, SP15 showed the accused the money [USD56,000] which was kept in the safe deposit box. The accused then left the hotel. As agreed between them, on 27 March 2000 the accused came to hotel again. At about 2.35pm on that day the accused entered Room 1722 again, carrying the brief case bag (P6). The accused sat on the sofa on the right. The accused told SP15

that he had the drugs in the bag. The accused opened P6 and delivered P36 to SP15. SP15 took out P37 from inside P36. SP15 then placed P37 on the table in the room. SP15 opened up P37 and found P38 inside it. SP15 untied the end of P38 and opened it. SP15 found P38 to contain the drug. SP15 smelled it and was satisfied that it was heroin. He asked the accused how would he know the weight of the drug. The accused told SP15 to believe him. SP15 took off his cap and placed it on the table. SP15 tied the end of P38 (which was still in P37). SP15 then brought P37 down from the table. At that time P38 and the drug was still inside P37. SP15 tied up the end of P37 and put it back in P36 which SP15 placed on the floor. In that room, SP15 also told the accused that he would give him 35,000 dollars and the accused said okay. Later SP15 told the accused, 'Let me go get the money now', to which the accused said, 'Yeah'. SP15 then opened the room door and as he stepped out of the room, SP5 rushed into the room and arrested the accused. SP5 recovered P6 and P36 on the floor about two feet in front of the sofa on which the accused was sitting. Upon examination, SP5 found P36 to contain P37. SP5 found P37 to contain P38 which he found to contain the heroin. There was therefore no doubt at all in my mind that the accused had trafficked in dangerous drug, in that he had carried or sent the dangerous drug or delivered or supplied the same to SP15. Alternatively, the overwhelming evidence adduced by the prosecution in this case also established that the accused was in actual possession of 630.4g of heroin attracting the presumption under s 37(da)(i) of the Dangerous Drug Act 1952.

CONCLUSION

[141] In the result I held that the prosecution had made out a prima facie case of trafficking in 630.4g of heroin, at the time on the date and place as stated in the charge against the accused. I therefore called upon the accused to enter on his defence.

The Three Alternatives Given To The Accused

[142] The three alternatives were then explained in English and given to the accused. The three alternatives were:

(a) giving evidence under oath, or

(b) making statement from the dock, or

(c) remaining silent.

The Accused Chose To Remain Silent

[143] Learned counsel informed the court that he had advised the accused to give evidence under oath but the accused refused.

[144] Court then asked the accused whether he understood the alternatives explained to him. The accused reply was, 'I understand'. The accused then said, 'I have nothing to say in this court'.

[145] Since it was then 4.35pm, I adjourned the hearing to the next day. This was also to enable the accused to discuss with his counsel.

[146] When the hearing resumed the next day, the same three alternatives were explained and given again in English to the accused.

[147] The accused admitted that he understood what was explained to him. I asked the accused, 'Do you understand what was explained to you just now?'. The accused said, 'Yes'. On the alternatives, the accused said, 'I have nothing to say. Let the court decide.'

[148] Learned counsel informed the court that the defence would not be calling any witness. The accused then told the court that he had nothing to say.

The Accused Was Found Guilty And Convicted

[149] From what had transpired in court, I was satisfied that the accused understood fully the three alternatives given to him and clearly, he chose to remain silent. Since the accused had elected to remain silent and he had not called any witness I held that the prosecution had proven beyond reasonable doubt the offence of trafficking in 630.4g of heroin as stated in the charge, against the accused. In the result I found him guilty and convicted him.

Sentence

[150] Section 39B(2) of the Dangerous Drugs Act 1952 provided only one mandatory sentence — death. I therefore passed the sentence that the accused be hanged by the neck until he is dead.

Guilty as charged and sentenced to death by hanging.

Reported by Ashgar Ali Ali Mohamed